(i) Be prepared in accordance with the limitations specified in paragraph (b) of this section.

(ii) Provide for the operation of the airplane with the instruments and equipment in an inoperable condition.

(4) Records identifying the inoperable instruments and equipment must be available to the pilot.

(5) The airplane is operated under all applicable conditions and limitations contained in the Minimum Equipment List and the operations specifications authorizing use of the Minimum Equipment List.

(b) The following instruments and equipment may not be included in the Minimum Equipment List:

(1) Instruments and equipment that are either specifically or otherwise required by the airworthiness requirements under which the airplane is type certificated and which are essential for safe operations under all operating conditions.

(2) Instruments and equipment required by an airworthiness directive.

(3) Instruments and equipment required for specific operations by this part.

(c) Notwithstanding paragraphs (b)(1) and (b)(3) of this section, an airplane with inoperable instruments or equipment may be operated under a special flight permit under §§ 21.197 and 21.199 of this chapter.

PART 125—CERTIFICATION AND OPERATIONS: AIRPLANES HAVING A SEATING CAPACITY OF 20 OR MORE PASSENGERS OR A MAXIMUM PAYLOAD CAPACITY OF 6,000 POUNDS OR MORE

5. The authority citation for Part 125 continues to read as follows:

Authority: 49 U.S.C. 1354, 1421 through 1430 and 1502; 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983).

6. By revising § 125.201 to read as follows:

§ 125.201 Inoperable instruments and equipment.

(a) No person may take off an airplane with inoperable instruments or equipment installed unless the following conditions are met:

(1) An approved Minimum Equipment List exists for the airplane.

(2) The Flight Standards District Office having certification responsibility has issued the certificate holder operations specifications authorizing operations in accordance with an approved Minimum Equipment List. The approved Minimum Equipment List shall be carried aboard the airplane or the flight crew shall have access at all times prior to and during flight to all of the information contained in the approved Minimum Equipment List. An approved Minimum Equipment List, as authorized by the operations specification, constitutes an approved change to the type design.

(3) The approved Minimum Equipment List must:

(i) Be prepared in accordance with the limitations specified in paragraph (b) of this section.

(ii) Provide for the operation of the airplane with the instruments and equipment in an inoperable condition.

(4) Records identifying the inoperable instruments and equipment must be available to the pilot.

(5) The airplane is operated under all applicable conditions and limitations contained in the Minimum Equipment List and the operations specifications authorizing use of the Minimum Equipment List.

(b) The following instruments and equipment may not be included in the Minimum Equipment List:

(1) Instruments and equipment that are either specifically or otherwise required by the airworthiness requirements under which the airplane is type certificated and which are essential for safe operations under all operating conditions.

(2) Instruments and equipment required by an airworthiness directive.

(3) Instruments and equipment required for specific operations by this part.

(c) Notwithstanding paragraphs (b)(1) and (b)(3) of this section, an airplane with inoperable instruments or equipment may be operated under a special flight permit under §§ 21.197 and 21.199 of this chapter.

PART 135—AIR TAXI OPERATORS AND COMMERCIAL OPERATORS

7. The authority citation for Part 135 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355(a), 1421–1431 and 1502; 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983).

8. By revising § 135.179 to read as follows:

§ 135.179 Inoperable instruments and equipment for multiengine aircraft.

(a) No person may take off an aircraft with inoperable instruments or equipment installed unless the following conditions are met:

(1) An approved Minimum Equipment List exists for the aircraft.

(2) The Flight Standards District Office having certification responsibility has issued the certificate holder operations specifications authorizing operations in accordance with an approved Minimum Equipment List. The approved Minimum Equipment List shall be carried aboard the aircraft or the flight crew shall have access at all times prior to and during flight to all of the information contained in the approved Minimum Equipment List. An approved Minimum Equipment List, as authorized by the operations specifications, constitutes an approved change to the type design.

(3) The approved Minimum Equipment List must:

(i) Be prepared in accordance with the limitations specified in paragraph (b) of this section.

(ii) Provide for the operation of the aircraft with the instruments and equipment in the inoperable condition.

(4) Records identifying the inoperable instruments and equipment and the information required by paragraph (a)(3)(ii) of this section must be available to the pilot.

(5) The aircraft is operated under all applicable conditions and limitations contained in the Minimum Equipment List and the operations specifications authorizing use of the Minimum Equipment List.

(b) The following instruments and equipment may not be included in the Minimum Equipment List:

(1) Instruments and equipment that are either specifically or otherwise required by the airworthiness requirements under which the airplane is type certificated and which are essential for safe operations under all operating conditions.

(2) Instruments and equipment required by an airworthiness directive.

(3) Instruments and equipment required for specific operations by this part.

(c) Notwithstanding paragraphs (b)(1) and (b)(3) of this section, an aircraft with inoperable instruments or equipment may be operated under a special flight permit under §§ 21.197 and 21.199 of this chapter.

Issued in Washington, DC, on January 12, 1989.

Robert L. Goodrich,

Acting Director, Flight Standards Service.

[FR Doc. 89–1171 Filed 1–19–89; 8:45 am]

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federal register

Monday
January 23, 1989

Part V

Department of Agriculture

Forest Service

36 CFR Parts 211, 228, and 261

Oil and Gas Resources; Proposed Rule

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Parts 211, 228, and 261

Oil and Gas Resources

AGENCY: Forest Service, USDA.

ACTION: Proposed rule.

SUMMARY: These proposed rules set forth the procedures by which the Forest Service of the U.S. Department of Agriculture would carry out its statutory responsibilities for management of oil and gas leasing and attendant surface disturbing activities conducted on leaseholds on National Forest System lands. In the past, the Forest Service has relied on Bureau of Land Management procedures and regulations. However, the Federal courts have ruled that the Forest Service must promulgate its own procedures and regulations. Additionally, the Federal Onshore Oil and Gas Leasing Reform Act of 1987 expanded the authority of the Secretary of Agriculture in the management of oil and gas resources on National Forest System lands and directed the Secretary to issue rules on bonding and reclamation standards. The intent of these rules is to satisfy both judicial direction and the new statute; to coordinate Forest Service oil and gas resource management procedures with those of the Bureau of Land Management, and to promote cooperation among the Agency, the oil and gas industry, and other publics interested in the management of oil and gas resources of the National Forest System lands.

DATE: Comments must be received in writing by March 24, 1989.

ADDRESSES: Send written comments to F. Dale Robertson, Chief (2820), Forest Service, USDA, P.O. Box 96090, Washington, DC 20090–6090.

The public may inspect comments received on these proposed rules in the office of the Director, Minerals and Geology Management Staff, Room 606, 1621 North Kent Street, Arlington, VA, during regular business hours (8 a.m. to 5 p.m.), Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Stanley Kurcaba, Minerals and Geology Management Staff, (703) 235–9715.

SUPPLEMENTARY INFORMATION: The Forest Service of the United States Department of Agriculture and the Bureau of Land Management of the United States Department of the Interior have joint responsibilities for the administration of the Federal oil and gas resources on National Forest System lands. In the past, the Forese Service has relied upon interagency agreements with the Bureau of Land Management to guide Forest Service review of proposed oil and gas leasing and review of proposed surface disturbances caused by oil and gas operations on those leases. However, the Forest Service has received judicial direction to promulgate regulations governing oil and gas leasing on National Forest System lands. The recently enacted Federal Onshore Oil and Gas Leasing Reform Act of 1987 (30 U.S.C. 226 et seq.) also requires the Forest Service to promulgate rules both to implement the new authority that the statute gave to the Secretary of Agriculture over oil and gas leasing and operations and to fufill the statute's mandate that the Secretary of Agriculture develop rules which ensure that adequate bonds are posted for reclamation of surface disturbing operations on a lease.

The Forest Service seeks to facilitate the orderly and environmentally sound development of Federal leasable oil and gas resources of the National Forest System in cooperation with the oil and gas industry and other interested publics. These regulations are designed to achieve that end.

The Secretary of Agriculture is reserving the authority at lease issuance to deny all operations on a leasehold in those circumstances where further environmental analyses beyond those done at the suitability determination indicate such preclusion is appropriate. This reservation of authority is required under such cases as *Conner* v. *Burford*, 848 F.2d 1441 (9th Cir. 1988) and *Sierra Club* v. *Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) to allow the agency the flexibility to engage in staged NEPA compliance. To the extent practicable given the changes in the Forest Service's authority over oil and gas leasing and operations made by the Leasing Reform Act, the proposed rule maintains the existing procedures by which the Bureau of Land Management and the Forest Service have been jointly responding to leasing and operating proposals. The primary reason for following the existing procedures to the extent practicable is that they reflect the many legal authorities applicable to oil and gas leasing and operating decisions and they are responsive to current management needs. In addition, agency personnel, the oil and gas industry and other persons interested in the management of National Forest System resources are familiar with existing procedures and requirements. Therefore, maintaining the existing procedures to the extent possible will reduce confusion over Agency roles and operator responsibilities in the leasing and development of Federal oil and gas resources located on National Forest System lands.

Many of the new requirements and procedures that are included in the proposed rule are designed to define the role that the Forest Service will play in the approval of oil and gas leasing and operations because of the expanded authority of the Secretary of Agriculture under the Leasing Reform Act. Other of the new requirements are included to implement the direction in the Leasing Reform Act to the Secretary of Agriculture to issue regulations establishing bonding standards.

The following briefly describes the role that the Forest Service would play under the proposed rule in the issuance of oil and gas leases, the approval of operations on the leaseholds, and the administration of those operations.

The Bureau of Land Management cannot issue leases for Federal oil and gas resources on National Forest System lands without the approval of the Forest Service. Therefore, the Forest Service must develop a process for making decisions as to whether to authorize the Bureau of Land Management to offer National Forest System lands for leasing. First, the Forest Service proposes to identify lands with potential for leasing based on existing oil and gas production, known geologic potential, or industry interest in an area and, in cooperation with the oil and gas industry, the Bureau of Land Management, and interested publics to develop a schedule for reviewing those areas. Then the Forest Service would determine if these lands with leasing potential are legally available for leasing. The Agency would review whether available lands are suitable for exploration and development by considering whether oil and gas development is consistent with the forest land and resource management plan or not precluded by the plan or if the lands could be suitable for leasing if stipulations governing surface uses were added to a lease. The Forest Service and Bureau of Land Management would then evaluate the adequacy of the Forest Plan Environmental Impact Statement or other National Environmental Policy Act documents to determine if additional National Environmental Policy Act analysis and documentation is required. The Forest Service would make a determination of an area's suitability for oil and gas leasing and give public notice of the decision. A suitability determination would be an appealable decision under Forest Service appeals procedures (36 CFR 211.18). The Forest Service would then forward its decision

to the appropriate Bureau of Land Management office.

The Bureau of Land Management would then be able to offer such lands for competitive sale. If there were no bidders for the offering, the lands would then be available for lease by an over-the-counter application process for a period of 2 years.

After the Bureau of Land Management issued a lease, the operator might seek to conduct surface disturbing activities on the lease. In accordance with the Federal Onshore Oil and Gas Leasing Reform Act, the proposed regulations would require an operator to obtain Forest Service approval of a surface use plan of operations before conducting operations. In order to coordinate review of proposed operations by the Forest Service and the Bureau of Land Management and to ease the administrative burden on the public, the proposed rules would direct operators to submit surface use plans of operations involving National Forest System lands to the Bureau of Land Management as part of the operator's Application for a Permit to Drill. The proposed rule specifies the information that the operator would have to include in a surface use plan of operations for a lease on National Forest System lands and encourages the operator to contact the appropriate local Forest Service office for assistance in preparing the proposed plan. Upon receipt of a surface use plan of operations involving operations on National Forest System lands, the Bureau of Land Management would forward that plan to the Forest Service for its review and approval.

Prior to, or in connection with, the submittal of a surface use plan of operations, the operator could request that the Forest Service authorize the Bureau of Land Management to modify or waive a stipulation included in a lease at the direction of the Forest Service. The proposed rule would permit the Forest Service to grant such a request in the circumstances specified after compliance with the National Environmental Policy Act of 1969 and other applicable laws. The Forest Service would give public notice of its decision on a substantial stipulation modification or waiver request in a newspaper of general circulation. The decision would be subject to administrative appeal under the procedures at 36 CFR 211.18.

The Forest Service would review a proposed surface use plan of operations for adequacy using the criteria proposed in the rule. If the plan of operations was adequate as submitted, the Forest Service would approve the plan. If the plan of operations was not adequate, the Forest Service could disapprove the plan or approve the plan subject to operating conditions which would render the plan adequate. As part of the review process, the Forest Service would establish bonding requirements for any plan of operations that would be approved. In accordance with the requirements of the Federal Onshore Oil and Gas Leasing Reform Act, the proposed rules would direct an operator to post a bond in an amount sufficient to ensure reclamation and the restoration of any lands or surface water adversely affected by the operations prior to the commencement of operations.

At the conclusion of the surface use plan of operations review process, the Forest Service would advise the operator and the appropriate Bureau of Land Management office of the decision on a proposed plan and, if appropriate, the bonding requirements for the operations. Public notice of the decision also would be given. The decision would be subject to administrative appeal under the procedures at 36 CFR 211.18.

If the operator completed the operations authorized by the initial surface use plan of operations and desired to conduct further operations, the operator would be required to submit a supplemental plan of operations which would be subject to review and approval in the same manner as an initial plan of operations.

The proposed regulations would require an operator to perform reclamation on the leasehold as the operations were completed. The proposed regulations also provide for the staged release of bonds as reclamation is completed.

Under the proposal, the operator would be required to conduct operations on the leasehold in accordance with the terms of the lease, these regulations and an approved surface use plan of operations. The proposed rule also details the remedies that the Forest Service would have if the operations conducted by the operator were not in compliance with the terms of the lease, these regulations and an approved surface use plan of operations. Initially, the Forest Service would try to obtain the operator's voluntary compliance with the applicable provision. If the operator refused to voluntarily comply, the proposed rules would provide that the Forest Service would issue the operator a notice of noncompliance specifying a deadline for the operator to bring the operations into compliance. The proposed regulations provide that if the operator still failed to come into compliance the Forest Service would take the following actions, as appropriate:

1. If the noncompliance appeared to be material, the Forest Service would initiate a material noncompliance proceeding in accordance with the procedures proposed in the regulations If the Forest Service official presiding over the proceeding found that the noncompliance was material, the operator and the Bureau of Land Management would be so advised. An operator found to be in material noncompliance would be ineligible to receive further Federal oil and gas leases or assignments until the operations were brought into compliance.

2. If the noncompliance was resulting in an imminent danger to public health or safety or in irreparable resource damage, the Forest Service could suspend the approval of the surface use plan of operations. The proposed rule provides that the suspension would last until the operator brought the operations into compliance.

3. If the noncompliance was resulting in an emergency, the Forest Service could take whatever measures were necessary to abate the emergency. The proposed regulations would require the operator to reimburse the Forest Service for the full cost of such abatement actions.

The proposed rule also advises the operator that the Forest Service could seek criminal penalties for the operator's noncompliance pursuant to 36 CFR Part 261.

In addition to these requirements which would be set forth at 36 CFR Part 228, Subpart E, the proposed rules would make conforming changes in two other existing Forest Service rules—36 CFR 211.18, which governs the Forest Service administrative appeal process; and 36 CFR Part 261, which specifies conduct on the National Forest System which is prohibited and for which criminal penalties may be imposed.

The following diagram illustrates how oil and gas leasing and operations would be administered on National Forest System lands:

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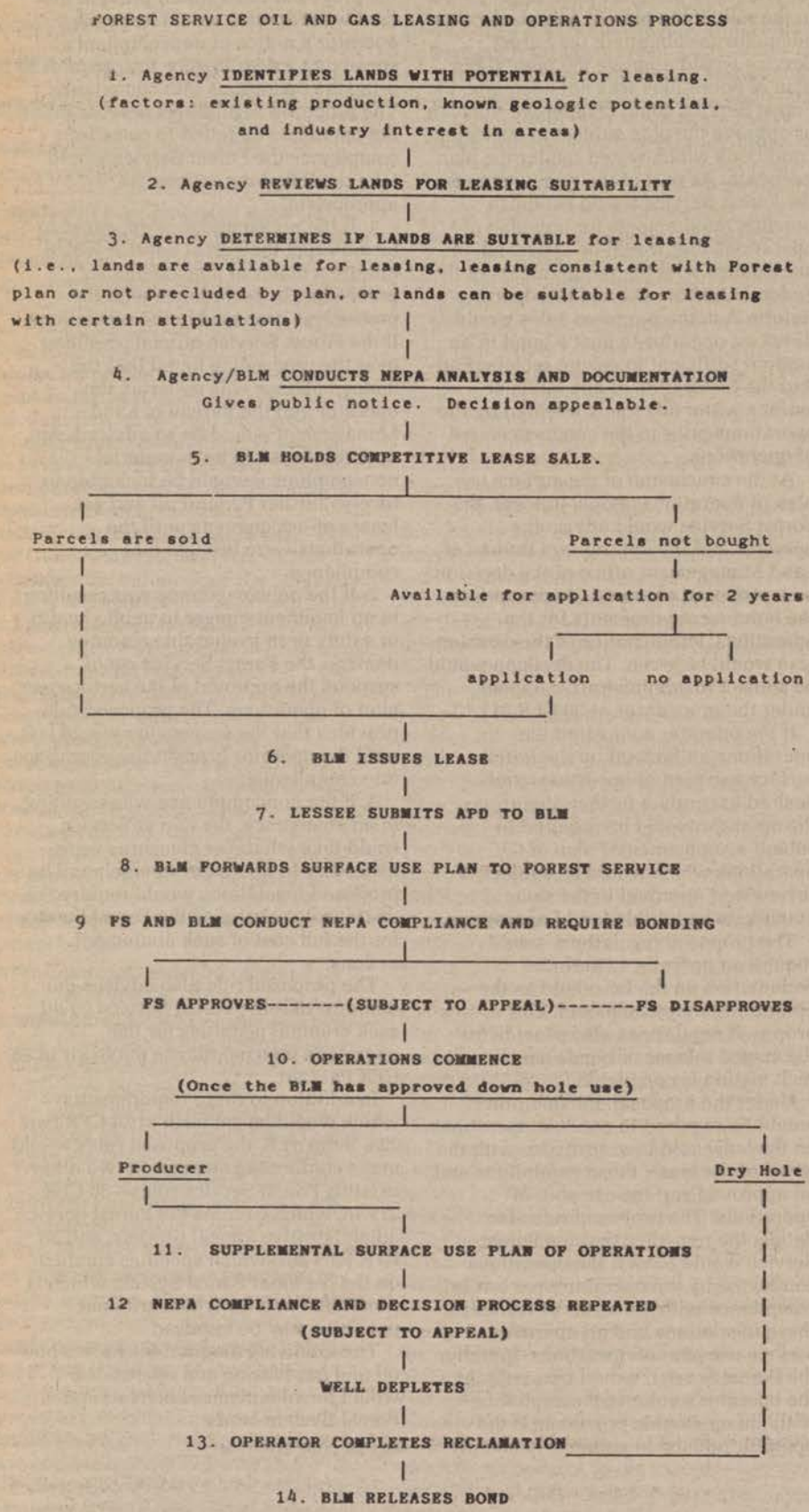

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Section-by-Section Analysis of Proposed Rule

The rules governing Forest Service procedures for responding to and managing oil and gas leasing and surface disturbing operations on National Forest System lands would be codified as a new Subpart E of Part 228 of Title 36 of the Code of Federal Regulations. The following section-by-section analysis describes in detail the provisions of the proposed rule.

Section 228.100 Scope and applicability.

This section specifies the scope of Forest Service responsibility in oil and gas leasing and further states that the rules would apply to leases and operations in effect as of the effective date of the rule as well as to new leases issued under the Federal Onshore Oil and Gas Leasing Reform Act of 1987. This section also makes clear that surface uses off a leasehold require authorization by the authorized Forest officer and cites the major existing rules that apply to those uses.

Section 228.101 Definitions.

This section defines special terms used in the proposed rules.

Section 228.102 Determination of lands suitable for leasing.

The Federal Onshore Oil and Gas Leasing Reform Act of 1987 made significant changes in the manner in which Federal oil and gas leasing is conducted. Under the Act, application for leases will no longer be accepted until after lands have been offered for competitive sales. Therefore, in order to offer leases, Federal Agencies must take the initiative to identify lands suitable for leasing and to make those lands available for competitive sale through the Bureau of Land Management. Under the proposed rule, each Forest Supervisor would, within 6 months of the effective date of the rule, identify those areas of the National Forest System in which there is potential for leasing and that have not been previously evaluated and develop a schedule for determining their suitability for oil and gas leasing. The Forest Supervisor, in cooperation with the oil and gas industry and the Bureau of Land Management, would give first priority to those areas having the highest potential for leasing. This would meet the mandate in the *Mountain States Legal Foundation vs Andrus (1980)* decision to require the Forest Service to develop a leasing process and would eliminate needless analyses of areas where no potential for oil and gas leasing exists. Potential lessees would have the opportunity to participate in the process of establishing the priority for reviewing those areas identified as having leasing potential.

When areas are reviewed for their suitability for leasing, this section would require the authorized Forest officer to identify those areas legally available (that is, not withdrawn from leasing), review the Forest land and resource management plan for direction, and identify conditions of occupancy that would be included as lease stipulations. The Forest Service and the Bureau of Land Management would cooperate in meeting the analysis and documentation requirements of the National Environmental Policy Act. This section would require the authorized Forest officer to give written notice to the Bureau of Land Management of the outcome of a suitability determination, which in effect is the notice to consent, or not to consent, to leasing certain lands. The authorized Forest officer would include any stipulations as a condition of leasing derived from the suitability determination. For decisions on suitability for leasing, the Regional Forester is the authorized Forest officer.

Section 228.103 Notice and transmittal of suitability decision.

This section would require public notice in a newspaper of general circulation of the suitability decision and of appeal rights available under 36 CFR 211.18. It should be noted that in addition to this public notice requirement, under existing agency procedures, all who request notice of a suitability decision would receive direct notice. This section also specifies inclusion in all leases to which the Forest Service consents of a standard stipulation that gives the lessee notice that the Secretary of Agriculture retains the authority to preclude all operations on a leasehold in those exceptional circumstances where further environmental analyses indicate such action is appropriate, that lease operations are subject to the regulations of the Secretary of Agriculture and that the operator must submit a surface use plan of operations for Forest Service approval or disapproval. The Secretary of Agriculture is specifically requesting public comments on the effect of this retention of authority and its effect on perceived lease value and compared with lease rights currently specified at 43 CFR 3101.1–2.

Section 228.104 Consideration of request to modify lease terms.

This section would allow an operator to request that the Forest Service modify or waive a stipulation included in a lease at the direction of the Forest Service. The proposed rule would permit the Forest Service to grant such a request in the circumstances specified after compliance with the National Environmental Policy Act of 1969 and other applicable laws. The Forest Service would give notice of its decision on a substantial stipulation modification or waiver request and of appeal rights under the procedures at 36 CFR 211.18 in a newspaper of general circulation.

Section 228.105 Operator's submission of a surface use plan of operations.

The proposed rule would clarify that an operator would submit a surface use plan of operations that would involve the National Forest System through the appropriate Bureau of Land Management office. Having the Bureau of Land Management continue to receive the entire Application for Permit to Drill (APD) package will provide for more efficient administration and less burden to an operator than submitting information separately to two agencies. This section also encourages cooperation between the operator and the Forest Service in preparing a surface use plan of operations prior to formally submitting an APD, thus eliminating potential problems early in the process. This section specifies surface use plan of operations content which is the same information as currently required for lands administered by the Bureau of Land Management.

Section 228.106 Review of a surface use plan of operations.

This section establishes the process by which the Forest Service would review a surface use plan of operations. Under this proposed process, the authorized Forest officer would base the approval of a surface use plan of operations on the terms of the lease, direction in the Forest land and resource management plan in effect at the time the surface use plan of operation is submitted, and information derived from the result of National Environmental Policy Act analyses.

When lands are determined to be suitable for leasing, a lessee can normally expect that future lease operations would be authorized, but the Forest Service must explicitly approve operations under a lease and comply with the National Environmental Policy Act before approving or denying such operations. Past experience demonstrates that most problems can be solved by the Forest Service and the lessee working cooperatively to obtain necessary revisions in the design of a

proposal. However, if the circumstances warrant, the Forest Service will use the authority granted the Secretary of Agriculture by the Leasing Reform Act of 1987 to disapprove proposed operations. In exceptional circumstances, this could mean that no operations would be approved on a leasehold.

This section also gives notice that the National Environmental Policy Act of 1969, implementing regulations at 40 CFR Parts 1500 through 1508, and Forest Service implementing policies and procedures must be followed as part of the Agency's review of an operating plan.

This section would further require the authorized Forest officer to advise the Bureau of Land Management of the reasons when a proposed surface use plan cannot be processed within 3 days after the conclusion of the 30-day notice period. Finally, this section requires the Forest Service to give public notice of a decision on a surface use plan of operations and appeal rights available under 36 CFR 211.18.

Section 228.107 Surface use requirements.

This section establishes requirements that would apply to oil and gas operations on the National Forest System. The requirements address the design of access facilities, protection of cultural and historic resources, fire prevention and control, maintaining fisheries, wildlife and plant habitat, conduct of reclamation, safety measures, waste disposal, and watershed protection. It is necessary to establish minimum surface use requirements for operations on National Forest System lands in order to carry out the direction in Section (g) of the Leasing Reform Act of 1987 which directs that:

> * * * For National Forest lands, the Secretary of Agriculture, shall regulate all surface disturbing activities conducted pursuant to any lease issued under the Act and shall determine reclamation and other actions as required in the interests of conservation of surface resources.

The surface use requirements of the rule are the same requirements as currently contained in standard stipulations that the Forest Service, until recently, has attached to all lease issuance decisions or recommendations.

Establishment of specific National reclamation standards would not be appropriate because of the diverse land surfaces, vegetation, animal life, soil types, etc., and the uniqueness of many surface disturbances. Therefore, standards for reclamation and mitigation measures to minimize adverse impacts are established for each operation by the Bureau of Land Management and Forest Service personnel during the onsite inspection as part of the review of each Application for Permit to Drill and the accompanying surface use plan of operations. General guidance on reclamation and operating standards is contained in a joint Bureau of Land Management, Forest Service, and Geological Survey publication entitled, "Surface Operating Standards for Oil and Gas Exploration and Development," Second Edition, August 1978.

Section 228.108 Bonds.

This section would establish that bonding is required before surface disturbing activities can be authorized and would require the authorized Forest officer to fix the bond amount at a sum adequate to ensure compliance with 30 U.S.C. 226(g). A bond required by the authorized Forest officer would be held by the Bureau of Land Management. This would provide for more efficient management and less burden on the public. The proposed rule does not establish a fixed bond sum because the extent of reclamation required varies by site and type of operation. The authorized Forest officer is in the best position to determine what is an adequate bond amount based upon on-the-ground site specific review of proposed operations.

Section 228.109 Indemnification.

This section would provide a means of protecting the United States Government from liability as a result of claims, demands, losses, or judgments caused by an operator's use or occupancy. This language is similar to that found in 36 CFR 251.56, terms and conditions for special use permits, and is necessary to adequately regulate occupancy.

Section 228.110 Temporary cessation of operations.

The Agency has experienced a high incidence of operators temporarily ceasing operations without adequate stabilization of the site or protection of resources or public safety. This section addresses this problem by requiring notification to the Forest Service of temporary or seasonal cessation of operations. This notification would allow the authorized Forest officer to work with the lessee in taking appropriate interim measures to protect resources or public safety.

Section 228.111 Compliance and inspection.

Section (g) of the Leasing Reform Act of 1987 (30 U.S.C. 226(g)) provides remedies in situations where operators fail to comply in any material respect with the reclamation, bonding, and other standards established by the Secretary of Agriculture. Because the sanctions of the Act can result in loss of leases, it is important to establish compliance procedures that ensure operators timely notice of noncompliance, opportunity to remedy the violation, and opportunity for a hearing. Sections 228.111 through 228.113 set forth both informal and formal compliance and hearing procedures. Section 228.111 would require the Forest officer to give notice to an operator when that operator is found in noncompliance with an approved surface use plan of operations, with stipulations made part of the lease at the direction of the Forest Service, or with these proposed regulations. Because it is the intent of the Forest Service to resolve problems at the local level if possible, this section is designed to encourage cooperation between the Forest Service and the operator.

This section also notifies the operator of other statutes applicable to their operations.

Section 228.112 Notice of noncompliance.

This section of this proposed rule would establish the formal procedures to be followed if the authorized Forest officer has determined an entity may have failed or refused to comply in any material respect with the reclamation requirements and other applicable standards established under 30 U.S.C. 226(g) of the Federal Onshore Oil and Gas Leasing Reform Act of 1987. The authorized Forest officer would be required to refer noncompliance such as, but not limited to, operating without an approved surface use plan of operations or failure to complete reclamation. The section describes the manner of serving notice and states that the authorized Forest officer shall either refer the matter to a compliance officer for review and/or suspend the surface use plan of operations in the event of imminent dangers to public health or safety and irreparable resource damage. The section also provides for the abatement of such emergencies as irreparable resource damage through actions by the Forest Service and for billing of the operator for costs incurred by the Agency to perform such abatement actions.

Section 228.113 Material noncompliance preceedings.

This section would establish the procedure for review and determination of material noncompliance. The Deputy Chief of the National Forest System would review a noncompliance referral made by the authorized Forest officer and if evidence supports a reasonable belief that an operator has failed to come into compliance with the requisite standards and that noncompliance may be material, the Deputy Chief would initiate the material noncompliance proceedings. The section requires due notice to the operator and specifies the content of the notice, permits an operator to submit argument and allows for an informal hearing at the operator's request or a fact finding conference.

The proposed rule specifies that the compliance officer's decision shall be based on the entire record and prescribes the content of decision letter.

Upon determining that an operator is in material noncompliance, the compliance officer would be required to notify the Secretary of the Interior of his/her findings. This section of the proposed rule would require the Deputy Chief for the National Forest System to maintain and distribute a list of operators in noncompliance to help ensure that pursuant to the 1987 Act, such operators do not receive future leases. Paragraph (g) of this section also provides for petition of the authorized Forest officer to rescind a finding of noncompliance once an entity has come into compliance. Reinstatement of an operator's opportunity to obtain future leases is clearly envisioned by the 1987 Leasing Reform Act and the petitioning process proposed in this section provides a manageable process for achieving reinstatement when an operator has come into compliance.

Section 228.114 Additional notice of decisions.

In compliance with 30 U.S.C. 226(f) of the Leasing Reform Act, this section requires the Forest Service to post notices provided by the Bureau of Land Management of lease sales, requests for modification of lease stipulations, and applications for permit to drill. The section specifies where such notices are to be posted and makes clear that posting notices is in addition to the public notice requirements imposed elsewhere in the rule.

36 CFR 211.18 Appeal of decisions of forest officers.

In addition to the proposed rules at Part 228, Subpart E of Title 36, this rulemaking contains an amendment to the rules governing appeal of decisions of authorized Forest officers. Under this proposed rule, 36 CFR 211.18 would be amended to exempt from those rules, appeal of decisions related to determining lands suitable for leasing made pursuant to 36 CFR 228.102 and related to the issuance of a notice of noncompliance or to material noncompliance proceedings related to oil and gas leasing operations on National Forest System lands pursuant to 36 CFR 228.11 through 228.112. Section 228.113 of the proposed rule would establish separate administrative procedures for material noncompliance decisions. It should be noted that, under this conforming amendment, the general public also could not appeal decisions related to compliance and noncompliance decisions. This exclusion is appropriate since compliance decisions are solely matters affecting the business relationship that exists between the operator and the Forest Service based on the terms of a Federal lease and an approved surface use plan of operations. Those decisions that are appealable are identified in this proposed rulemaking.

36 CFR Part 261 Prohibitions.

Ths rulemaking also contains an amendment to the rules governing occupancy of the National Forest System. Under this proposed rule, 36 CFR Part 261, Subpart A—General Prohibitions, would amend "Operating Plan" to include a surface plan of operations as provided for in 36 CFR Part 228, Subpart E. This is necessary to differentiate between a plan of operations at 36 CFR Part 228, Subpart A.

Regulatory Impact

These proposed rules have been reviewed under the Department of Agriculture procedures and Executive Order 12291, and it has been determined that these regulations are not major rules. This regulation will not have an effect on the economy of $100 million or more and, in and of itself, will not increase major costs to consumers, geographic regions, industry, or Federal, State, and local agencies. These regulations are essentially procedural and represent no change in current requirements on lessees, assignees, or operators and, therefore, it will not adversely affect competition, employment, investment, productivity, innovation, or the ability of United States based enterprises to compete in foreign markets.

It has also been determined that these proposed rules do not have a significant economic impact on a substantial number of small entities because of its limited scope and application. Therefore, the proposed rules are not subject to review under the Regulations Flexibility Act (5 U.S.C. 60 et seq.).

It should be noted, that while the requirements of the surface use plan of operations proposed in this rule are new requirements by the Department of Agriculture, the requirements are identical to that now required by the Bureau of Land Management, U.S. Department of the Interior, as part of an Application for Permit, to Drill or Sundry Notice and, therefore, will not increase the amount or type of information a lessee would have to submit for operations on National Forest System lands.

The total burden hours on an operator are estimated to be 125 hours annually. These hours are the same as estimated by the Bureau of Land Management in its request for Office of Management and Budget clearance of Forms 3160–3 and 3160–5. These forms were cleared through December 31, 1988, and are assigned clearance numbers 1004–0136 and 1004–0135 respectively. An operator proposing to conduct surface disturbing activities on the National Forest System is required to utilize these existing Bureau of Land Management forms and submit information required in this proposed rule to the appropriate Bureau of Land Management office.

However, because these requirements will not be levied by the Department of Agriculture, a request for approval of these new reporting requirements has been submitted to the Office of Management and Budget pursuant to 5 CFR Part 1320. Those wishing to comment on the proposed information requirements of this rule are encouraged to send their written comments to the Forest Service and to the:

USDA Regulatory Desk Officer, Office of Information and Regulatory Affairs, Attention: Docket Library, Room 3201 NEOB, Washington, DC 20503

Based on both experience and environmental analysis, this proposed rule will have no significant effect on the human environment, individually or cumulatively. Therefore, it is categorically excluded from documentation in an environmental assessment or an environmental impact statement (40 CFR 1508.4).

List of Subjects

36 CFR Part 211

Administrative practice and procedure, Fire prevention, Intergovernmental relations, National forests.

36 CFR Part 228

Administrative practices and procedures, Environmental protection, Mines, National forests, Public lands—Mineral resources, Rights of way, Reporting and recordkeeping, Surety bonds, Wilderness areas.

36 CFR Part 261

Law enforcement, National forests.

Therefore, for the reasons set forth in the preamble, it is proposed to amend Chapter II of Title 36 of the Code of Federal Regulations as follows:

PART 211—ADMINISTRATION

1. The authority citation for Part 211 would continue to read as follows:

Authority: 30 Stat. 35, as amended, sec. 1, 33 Stat. 628 (16 U.S.C. 551, 472).

Subpart B—Appeal of Decisions Concerning the National Forest System

2. Amend § 211.18 by adding a new paragraph (b)(16) to read as follows:

§ 211.18 Appeal of decisions of Forest officers.

* * * * *

(b) * * *

(16) Decisions made pursuant to 36 CFR Part 228, Subpart E, except as otherwise provided by §§ 228.102(d), 228.104(c) and 228.106(b).

* * * * *

PART 228—MINERALS

1. The authority citation for Part 228 would be revised to read as follows:

Authority: 30 Stat. 35 and 36, as amended (16 U.S.C. 478, 551); 41 Stat. 437, as amended, sec. 5102(d), 101 Stat. 1330–256 (30 U.S.C. 226); 61 Stat. 914, as amended (30 U.S.C. 352).

2. Add new Subpart E to read as follows:

Subpart E—Oil and Gas Resources

Sec.

§ 228.100 Scope and applicability.

(a) *Scope.* This subpart sets forth the rules and procedures by which the Forest Service of the United States Department of Agriculture will carry out its statutory responsibilities in the issuance of oil and gas leases on National Forest System lands, for approval and modification of attendant surface use plans of operations, for monitoring of surface disturbing operations on such leases, and for enforcement of surface use requirements and reclamation standards.

(b) *Applicability.* The rules of this subpart apply to leases on National Forest System lands and to operations that are conducted on Federal oil and gas leases on National Forest System lands as of (*Insert effective date of these rules*].

(c) *Applicability of other rules.* Surface uses, including access, associated with oil and gas prospecting, exploration, development, production, and reclamation activities, that are conducted on National Forest System lands outside a leasehold must be authorized by the Forest Service. Such off-leasehold activities are subject to the regulations set forth elsewhere in 36 CFR Chapter II, including but not limited to the regulations set forth in 36 CFR Parts 251 and 261.

§ 228.101 Definitions.

For the purposes of this subpart, the terms listed in this section have the following meanings:

Assignee. A person to whom a lessee has transferred all or part of the lessee's interest in a Federal oil and gas lease.

Assignment. The transfer of all or part of an interest in a Federal oil and gas lease by a lessee to an assignee.

Authorized Forest officer. The Forest Service employee delegated the authority to perform a duty described in these rules. Generally, a Regional Forester, Forest Supervisor, District Ranger, or Minerals Staff Officer depending on the scope and level of the duty to be performed.

Compliance Officer. The Deputy Chief, or the Associate Deputy Chiefs, National Forest System or the line officer designated to act in the absence of the Duty Chief.

Leasehold. The area described in a Federal oil and gas lease.

National Forest System. All National Forest lands reserved or withdrawn from the public domain of the United States, all National Forest lands acquired through purchase, exchange, donation, or other means, the National Grasslands and land utilization projects administered under title III of the Bankhead-Jones Tenant Act (7 U.S.C.A. 1010 et seq.), and other lands, waters, or interests therein which are administered by the Forest Service or are designated for administration through the Forest Service as a part of the system (16 U.S.C. 1609).

Off-leasehold. A term used to characterize activities associated with oil and gas leasing operations that occur on National Forest System lands outside the area described in a Federal oil and gas lease.

Operations. Surface disturbing activities that are conducted on a leasehold on National Forest System lands pursuant to a current approved surface use plan of operations, including but not limited to, exploration, development, production and utilization of oil and gas resources and reclamation of surface resources.

Operator. A person who is conducting operations pursuant to a Federal oil and gas lease. The operator may be a lessee, assignee, or a person conducting operations on behalf of a lessee or assignee.

Person. An individual, partnership, corporation, association or other legal entity.

Surface use plan of operations. A document submitted by an operator as part of an Application for Permit to Drill or a supplement to an approved plan of operations detailing proposed surface occupancy and planned operations pursuant to a Federal oil and gas lease.

Leasing

§ 228.102 Determination of land suitable for leasing.

(a) *Compliance with the National Environmental Policy Act of 1969.* In determining lands suitable for leasing, the authorized Forest officer shall comply with the National Environmental Policy Act of 1969, implementing regulations at 40 CFR Parts 1500–1508, and Forest Service implementing policies and procedures set forth in Forest Service Manual Chapter 1950 and Forest Service Handbook 1909.15. In compliance with the Act, the authorized Forest officer shall take into

consideration the authority granted by the Federal Onshore Oil and Gas Leasing Reform Act of 1987, to subsequently approve or disapprove a surface use plan of operations proposed following issuance of a lease.

(b) *Identification of potential leasing areas.* Within 6 months of the effective date of these rules, Forest Supervisors shall identify those areas of the National Forest System under their jurisdiction that have potential for oil and gas leasing and that have not previously been evaluated for their suitability for oil and gas leasing.

(1) An area shall be considered to have potential for oil and gas leasing if:

(i) There is ongoing oil and gas production in the area;

(ii) The geological environment of the area is known to be favorable for the accumulation of oil and gas resources; or

(iii) There is ongoing industry interest in obtaining oil and gas leases for the area.

(2) After identifying those areas that have potential for oil and gas leasing, each Forest Supervisor shall consult with the oil and gas industry, the Bureau of Land Management, and other interested parties and develop a schedule for reviewing areas not previously evaluated to determine their suitability for oil and gas leasing. In developing this schedule, the Forest Supervisor shall give first priority to reviewing those areas that appear to have the highest potential for leasing. The Forest Supervisor may update the schedule as appropriate.

(c) *Review of lands for leasing suitability.* In reviewing areas identified as having potential for oil and gas leasing, the authorized Forest officer:

(1) Shall identify and exclude from further review the following lands, which are not available for leasing:

(i) Lands withdrawn from mineral leasing by an act of Congress or by an order of the Secretary of the Interior;

(ii) Lands recommended for wilderness allocation by the Secretary of Agriculture;

(iii) Lands designated by statute as wilderness study areas, unless oil and gas leasing is specifically allowed to continue by the statute designating the study area;

(iv) Lands within areas allocated for wilderness or further planning in Executive Communication 1504, Ninety-Sixth Congress (House Document No. 96–119), unless such lands subsequently have been allocated to uses other than wilderness by an approved forest land and resource management plan or have been released to uses other than wilderness by an act of Congress; and

(v) Roadless areas currently undergoing evaluation pursuant to 36 CFR 219.17; and,

(2) Shall review the relevant forest land and resource management plan to identify direction, management prescriptions, and associated standards and guidelines that would be applicable to oil and gas leasing on the area.

(d) *Determination of suitability.* The respective Regional Forester shall determine that an area is suitable for oil and gas leasing and authorizes the Bureau of Land Management to offer oil and gas leasing upon:

(1) A finding that the lands are available for oil and gas leasing,

(2) A finding that oil and gas leasing operations on the area would be consistent with, or would not be precluded by, the applicable forest land and resource management plan, management prescriptions, and associated standards and guidelines in the plan, and

(3) Identification of conditions of surface occupancy and use that would be required as stipulations in leases issued for the area to ensure consistency with law and the forest land and resource management plan for the area.

§ 228.103 Notice and transmittal of suitability decision.

(a) *Public notice.* The authorized Forest officer shall give public notice in a newspaper of general circulation of the outcome of each suitability review conducted pursuant to § 228.102(d). The notice shall further specify that the decision is subject to administrative appeal under the procedures at 36 CFR 211.18.

(b) *Notice to the Bureau of Land Management.* The authorized Forest officer shall promptly notify the appropriate Bureau of Land Management office, in writing, of the decision. The notice shall clearly specify those lands that the Forest Service authorizes the Bureau of Land Management to offer for oil and gas leasing and those stipulations which the Forest Service directs the Bureau of Land Management to include in a lease which may be issued for those lands.

(c) *Standard stipulation.* The following standard stipulation shall be included in oil and gas leases issued for National Forest System lands: "The lessee must comply with the applicable rules and regulations of the Secretary of Agriculture set forth at Title 36, Chapter II, of the Code of Federal Regulations governing use and management of the National Forest System and must submit to the authorized Forest officer a surface use plan of operations for approval or disapproval in accordance with 36 CFR Part 228, Subpart E. The Secretary of Agriculture retains the authority under this lease to preclude all operations on a leasehold where analyses of the environment indicate such action is appropriate."

§ 228.104 Consideration of requests to modify lease terms.

(a) *General.* A person proposing to conduct operations on a lease may request the authorized Forest officer to authorize the Bureau of Land Management to modify or waive a stipulation included in a lease at the direction of the Forest Service except for the standard stipulation as required by § 228.103(c) of this subpart. The person making the request should submit any information which might assist the authorized Forest officer in making a decision.

(b) *Review.* The authorized Forest officer shall review any information submitted in support of the request and any other pertinent information.

(1) As part of the review, the authorized Forest officer shall comply with the National Environmental Policy Act of 1970 (42 U.S.C. 4331 et seq.) and any other applicable laws, and prepare any appropriate environmental documents.

(2) The authorized Forest officer may grant a request to modify or waive a stipulation if:

(i) Modification or waiver of the stipulation is consistent with applicable Federal laws;

(ii) Modification or waiver of the stipulation is consistent with the current forest land and resource management plan if such a plan is in effect;

(iii) The management objectives which led the Forest Service to require the inclusion of the stipulation in the lease can be met without restricting operations in the manner provided for by the stipulation given the present condition of the surface resources or the nature, location, or timing of the proposed operations; or are no longer applicable for the area; and

(iv) Is acceptable to the authorized Forest officer based upon the review of the environmental consequences of the proposed modification.

(c) *Notice of decision.* (1) When the review of a stipulation modification or waiver request has been completed and the authorized Forest officer has reached a decision, the authorized Forest officer shall promptly notify the operator and the appropriate Bureau of Land Management office, in writing, of the decision to grant, with or without additional conditions, or deny the request.

(2) For any decision to modify or waive a lease stipulation that would result in a substantial modification of a lease term, the authorized Forest officer shall give notice in a newspaper of general circulation of the decision. The notice shall specify that the decision is subject to administrative appeal at 36 CFR 211.18.

Authorization of Occupancy Within a Leasehold

§ 228.105 Operator's submission of surface use plan of operations.

(a) *General.* An operator proposing to conduct operations that will cause disturbance of surface resources of National Forest System lands must submit a proposed surface use plan of operations as part of the Application for Permit to Drill to the appropriate Bureau of Land Management office for forwarding to the Forest Service.

(b) *Preparation of plan.* In preparing the surface use plan of operations, the operator is encouraged to contact the local Forest Service office for assistance and to make use of such information as is available from the Forest Service concerning the surface resources and uses, environmental considerations, and local reclamation procedures.

(c) *Content of plan.* The type, size, and intensity of the proposed operations and the sensitivity of the surface resources that will be affected by the proposed operations determine the level of detail and the amount of information which the operator must include in a proposed plan of operations. However, any surface use plan of operations submitted by an operator shall contain maps and plats of a scale no smaller than 1:24,000 and narrative descriptions which provide the following information:

(1) *Access facilities.* The location, size, and type of existing or new access facilities that the operator proposes to use, maintain, improve, or construct in connection with the operations;

(2) *Ancillary facilities.* The location, size, and type of any ancillary facilities (such as airstrips, camps, living facilities, parking areas, reserve and burn pits, and soil material stockpiles) that the operator proposes to use in connection with the operations;

(3) *Drill pad.* The location and design parameters of the drill pad that the operator proposes to construct;

(4) *Production facilities.* To the extent known or anticipated, the location, size, and type of production facilities and lines that the operator anticipates would be installed if the well is successful;

(5) *Reclamation measures.* The measures that the operator proposes to take to reclaim surface resources disturbed in connection with the operations, including information on the configuration of the reshaped topography, drainage system, segregation of spoil materials, surface manipulations, waste disposal, revegetation methods, soil treatments and other practices necessary to reclaim all disturbed areas, including any access roads or portions of drill pads when no longer needed;

(6) *Reclamation timing.* An estimate of the time for commencement and completion of reclamation operations, dependent upon weather conditions and other surface uses of the area;

(7) *Waste disposal.* The methodology that the operator proposes to use for the safe containment and disposal of the waste materials (such as cuttings, garbage, salts, chemicals, sewage, etc.) that will result from drilling the proposed well and the location of the waste containment and disposal facilities that the operator proposes to utilize; and

(8) *Other information.* Any other information that might assist the authorized Forest officer in reviewing the proposed surface use plan of operations.

(d) *Supplemental plan.* The operator must submit a supplemental surface use plan of operations to the Bureau of Land Management for forwarding to the Forest Service whenever the operator proposes to conduct additional surface disturbing operations that are not authorized by a current approved surface use plan of operations. A supplemental plan of operations is subject to the same requirements under this subpart as an initial surface use plan of operations.

§ 228.106 Review of surface use plan of operations.

(a) *Review.* The authorized Forest officer shall review and decide on the adequacy of a surface use plan of operations as promptly as practicable given the nature and scope of the proposed plan.

(1) As part of the review, the authorized Forest officer shall comply with the National Environmental Policy Act of 1969, implementing regulations at 40 CFR Parts 1500 through 1508, and the Forest Service implementing policies and procedures set forth in Forest Service Manual Chapter 1950 and Forest Service Handbook 1909.15.

(2) An adequate surface use plan of operations is one that:

(i) Contains the information specified in § 228.105(c) of this subpart;

(ii) Is consistent with the terms of the lease, including the lease stipulations, and applicable Federal laws;

(iii) Is consistent with the current forest land and resource management plan if such a plan is in effect; and

(iv) Meets or exceeds the surface use requirements of § 228.107 of this subpart.

(v) Is acceptable to the authorized Forest officer based upon the review of the environmental consequences of the proposed operation.

(b) *Decision.* The authorized Forest officer shall make a decision on the approval of a surface use plan of operations as follows:

(1) If the authorized Forest officer will not be able to make a decision on the proposed plan within 3 days after the conclusion of the 30-day notice period provided for by 30 U.S.C. 226(f), the authorized Forest officer shall advise the appropriate Bureau of Land Management office, either in writing or orally with subsequent written confirmation, that additional time will be needed to process the plan. The authorized Forest officer shall explain the reason why additional time is needed and predict the date by which the authorized Forest officer will make a decision on the plan.

(2) When the review of a surface use plan of operations has been completed, the authorized Forest officer shall promptly notify the operator and the appropriate Bureau of Land Management office, in writing, that:

(i) The plan is approved as submitted upon signature of the operator and posting of the required bond with the Bureau of Land Management as specified by the authorized Forest officer (§ 228.108);

(ii) The plan is approved subject to specified operating conditions upon signature of the operator and posting of the required bond with the Bureau of Land Management as specified by the authorized Forest officer (§ 228.108); or

(iii) The plan has been disapproved for the reasons stated.

(c) *Notice of decision.* The authorized Forest officer shall give public notice of the decision on a plan and include in the notice that the decision is subject to appeal under the administrative appeal procedures at 36 CFR 211.18.

(d) *Transmittal of decision.* The authorized Forest officer shall immediately forward a decision on the approval of a surface use plan of operations to the appropriate Bureau of Land office.

(e) *Supplemental plans.* A supplemental surface use plan of operations (§ 228.105(d)) is reviewed in the same manner as an initial surface use plan of operations.

§ 228.107 Surface use requirements.

(a) *General.* The operator shall conduct operations on a leasehold on National Forest System lands to minimize effects on surface resources, to prevent unnecessary or unreasonable surface resource disturbance, and in compliance with the other requirements of this section.

(b) *Notice of operations.* The operator must notify the authorized Forest officer 48 hours prior to commencing operations or resuming operations following their temporary cessation (§ 228.110).

(c) *Access facilities.* The operator shall construct and maintain access facilities to assure adequate drainage and to minimize or prevent damage to surface resources.

(d) *Cultural and historical resources.* The operator shall report findings of cultural and historical resources to the authorized Forest officer immediately and, except as otherwise authorized in an approved surface use plan of operations, protect such resources.

(e) *Fire prevention and control.* To the extent practicable, the operator shall take measures to prevent uncontrolled fires on the area of operation and to suppress uncontrolled fires resulting from the operations.

(f) *Fisheries, wildlife and plant habitat.* The operator shall comply with the requirements of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and its implementing regulations (50 CFR Chapter IV), and, except as otherwise provided in an approved surface use plan of operations, conduct operations in such a manner as to maintain and protect other fisheries, wildlife, and plant habitat.

(g) *Reclamation.* (1) Unless otherwise provided in an approved surface use plan of operations, the operator shall conduct reclamation concurrently with other operations.

(2) Within 1 year of completion of operations on a portion of the area of operation, the operator must reclaim that portion, unless a different period of time is specified in writing by the authorized Forest officer.

(3) The operator must:

(i) Control soil erosion and landslides;

(ii) Control water runoff;

(iii) Remove, or control, solid wastes, toxic substances, and hazardous substances;

(iv) Reshape and revegetate disturbed areas;

(v) Remove structures, improvements, facilities and equipment, unless otherwise authorized; and

(vi) Take such other reclamation measures as specified in the approved surface use plan of operations.

(h) *Safety measures.* (1) The operator must maintain structures, facilities, improvements, and equipment located on the area of operation in a safe and neat manner and in accordance with an approved surface use plan of operations.

(2) The operator must take appropriate measures in accordance with applicable Federal and State laws and regulations to protect the public from hazardous sites or conditions resulting from the operations. Such measures may include, but are not limited to, posting signs, building fences, or otherwise identifying the hazardous site or condition.

(i) *Wastes.* The operator must either remove garbage, refuse, and sewage from National Forest System lands or treat and dispose of that material in such a manner as to minimize or prevent adverse impacts on surface resources. The operator shall treat or dispose of produced water, drilling fluid, and other waste generated by the operations in such a manner as to minimize or prevent adverse impacts on surface resources.

(j) *Watershed protection.* (1) Except as otherwise provided in the approved surface use plan of operations, the operator shall not conduct operations in areas subject to mass soil movement, riparian areas and wetlands.

(2) The operator shall take measures to minimize or prevent erosion and sediment production. Such measures include, but are not limited to, siting structures, facilities, and other improvements to avoid steep slopes and excessive clearing of land.

§ 228.108 Bonds.

(a) *Bond amount.* As part of the review of a proposed surface use plan of operations, the authorized Forest officer shall determine, based upon the costs of reclamation of surface disturbance and other pertinent factors, the bonding requirements for any plan of operations that the authorized Forest officer proposes to approve. Bonds required by the Forest Service are posted with the Bureau of Land Management.

(b) *Calculation.* The authorized Forest officer shall fix the amount of the bond at the sum that is adequate, for the entire period of operations that will be authorized by the plan of operations, to ensure compliance with 30 U.S.C. 226(g), including complete and timely reclamation of the leasehold and the restoration of lands or surface waters adversely affected by lease operations after the abandonment or cessation of oil and gas operations on the lease. An adequate amount is one that is equal to but not greater than the cost of reclaiming surface disturbances.

(c) *Reduction in bond amount after reclamation.* (1) The operator may request the authorized Forest officer to request the Bureau of Land Management to approve a reduction in the amount of an individual lease bond whenever the operator receives a notice that reclamation has been satisfactorily completed on a portion of the area of operation.

(2) The authorized Forest officer receiving the request shall:

(i) Calculate the sum that is sufficient for the remainder of the period of operation authorized by the surface use plan of operations;

(ii) Notify the Bureau of Land Management of the amount that is sufficient for the remainder of operations; and

(iii) If appropriate under the circumstances, recommend a reduction in the amount of the bond.

(d) *Recalculation of bond requirements.* The authorized Forest officer shall recalculate bonding requirements whenever the authorized Forest officer proposes to approve a supplemental plan of operations (§ 228.105(d)).

§ 228.109 Indemnification.

The operator and, if the operator does not hold all of the interest in the applicable lease, all lessees and assignees are jointly and severally liable in accordance with Federal and State laws for indemnifying the United States for:

(a) Injury, loss or damage, including fire suppression costs, which the United States incurs as a result of the operations; and

(b) Payments made by the United States in satisfaction of claims, demands or judgments for an injury, loss or damage, including fire suppression costs, which result from the operations.

Administration of Operations

§ 228.110 Temporary cessation of operations.

(a) *General.* Except as provided in paragraph (b) of this section, immediately upon the temporary cessation of operations for a period of 45 days or more, the operator must file a statement with the authorized Forest officer that verifies the operator's intent to maintain structures, facilities, improvements, and equipment that will remain on the area of operation during the cessation of operations and that specifies the expected date by which operations will be resumed.

(b) *Seasonal shutdowns.* The operator need not file the statement required by paragraph (a) of this section if the

cessation of operations results from seasonally adverse weather conditions and the operator will resume operations promptly upon the conclusion of those adverse weather conditions.

(c) *Interim measures.* The authorized Forest officer may require the operator to take reasonable interim reclamation or erosion control measures to protect surface resources during temporary cessations of operations, including cessations of operations resulting from seasonally adverse weather conditions.

§ 228.111 Compliance and inspection.

(a) *General.* Operations must be conducted in accordance with the lease, including stipulations made part of the lease at the direction of the Forest Service, an approved surface use plan of operations, and the regulations of this subpart.

(b) *Voluntary correction of noncompliance.* When, during an inspection, an authorized Forest officer finds that the operator is not in compliance with a reclamation requirement or other standard in a stipulation included in the lease at the request of the Forest Service, an approved surface use plan of operations or the regulations of this subpart, the authorized Forest officer shall promptly notify the operator on-site or by telephone of the noncompliance and give the operator the opportunity to either correct the noncompliance or, if appropriate, to reach agreement with the authorized Forest officer on an amendment to the approved surface use plan of operations that would remedy the noncompliance. After discussing the noncompliance with the operator, the authorized Forest officer shall establish a deadline for voluntary compliance, advise the operator of the deadline, and make a note to the file of the noncompliance, the applicable deadline, and the date the operator was advised of the deadline. If the operations have not been brought into compliance by the deadline, the authorized Forest officer shall utilize the provisions of § 228.112 of this subpart.

(c) *Completion of reclamation.* The authorized Forest officer shall give prompt written notice to an operator whenever reclamation of a portion of the area affected by surface operations has been satisfactorily completed in accordance with the approved surface use plan of operations and § 228.106 of this subpart. The notice shall describe the portion of the area on which the reclamation has been satisfactorily completed.

(d) *Compliance with other statutes and regulations.* Nothing in this subpart shall be construed to relieve an operator from complying with applicable Federal and State laws or regulations, including, but not limited to:

(1) Federal and State air quality standards, including the requirements of the Clean Air Act, as amended (42 U.S.C. 1857 et seq.);

(2) Federal and State water quality standards including the requirements of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151 et seq.);

(3) Federal and State standards for the use or generation of solid wastes, toxic substances and hazardous substances;

(4) The Endangered Species Act of 1973, 16 U.S.C. 1531 et seq., and its implementing regulations, 50 CFR Chapter IV; and

(5) The Archeological Resources Protection Act of 1979, as amended (16 U.S.C. 470aa et seq.) and its implementing regulations 36 CFR Part 296.

(e) *Penalties.* An operator is subject to the prohibitions and attendant penalties of 36 CFR Part 261 if surface disturbing operations are being conducted that are not authorized by an approved surface use plan of operations or those operations violate a term or operating condition of an approved surface use plan of operations.

(f) *Inspection.* Forest Service officers shall periodically inspect the area of operations to determine whether the operation are being conducted in compliance with the regulations in this subpart, the stipulations included in the lease at the direction of the Forest Service, and an approved surface use plan of operations.

§ 228.112 Notice of noncompliance.

(a) *Issuance.* When an operator has not voluntarily corrected an instance of noncompliance with a reclamation requirement or other standard, in a stipulation included in a lease at the direction of the Forest Service, an approved surface use plan of operation, or the regulations in this subpart by the deadline established through the procedures of §228.111(b) of this subpart, the authorized Forest officer shall issue a notice of noncompliance.

(1) *Content.* The notice of noncompliance shall include the following:

(i) Identification of the reclamation requirements or other standard(s) with which the operator is not in compliance;

(ii) Description of the measures which are required to correct the noncompliance;

(iii) Specification of a reasonable period of time within which the noncompliance must be corrected;

(iv) If the noncompliance appears to be material, identification of the possible consequences of continued noncompliance of the requirement(s) or standard(s) as described in 30 U.S.C. 226(g);

(v) If the noncompliance appears to be in violation of the prohibitions set forth in 36 CFR Part 261, identification of the possible consequences of continued noncompliance of the requirement(s) or standard(s) as described in 36 CFR 261.1b; and

(vi) Notification that the authorized Forest officer remains willing and desirous of working cooperatively with the operator to resolve or remedy the noncompliance.

(2) *Extension of deadlines.* The oeprator may request an extension of a deadline specified in a notice of noncompliance if the operator is unable to come into compliance with the applicable requirement(s) or standard(s) identified in the notice of noncompliance by the deadline because of conditions beyond the operator's control. The authorized Forest officer shall not extend a deadline specified in a notice of noncompliance unless the operator requested an extension and the authorized Forest officer finds that there was a condition beyond the operator's control, that such condition prevented the operator from complying with the notice of noncompliance by the specified deadline, and that the extension will not adversely affect the interests of the United States. Conditions which may be beyond the operator's control include, but are not limited to, closure of an area in accordance with 36 CFR Part 261, Subparts B or C, or inaccessibility of an area of operations due to such conditions as fire, flooding, or snowpack.

(3) *Manner of service.* The authorized Forest officer shall serve a notice of noncompliance or a decision on a request for extension of a deadline specified in a notice upon the operator in person, by certified mail or by telephone. However, if notice is initially provided in person or by telephone, the authorized Forest officer shall send the operator written confirmation of the notice or decision by certified mail.

(b) *Failure to come into compliance.* If the operator fails to come into compliance with the applicable requirement(s) or standard(s) identified in a notice of noncompliance by the deadline specified in the notice, or an approved extension, the authorized Forest officer shall decide whether the noncompliance appears to be material given the reclamation requirements and other standards applicable to the lease established by 30 U.S.C. 226(g) the

regulations in this subpart, the stipulations included in a lease at the direction of the Forest Service, or an approved surface use plan of operations and whether the noncompliance is resulting in an imminent danger to public health or safety, irreparable resource damage or another emergency.

(1) *Referral to compliance officer.* When the operations appear to be in material noncompliance, the authorized Forest officer shall promptly refer the matter to the compliance officer. The referral shall be accompanied by a complete statement of the facts supported by appropriate exhibits. Noncompliance which the authorized Forest officer shall refer includes, but is not limited to, operating without an approved surface use plan of operations, operating under a suspended surface use plan of operations, failing to timely complete reclamation in accordance with an approved surface use plan of operations, failing to maintain an acceptable bond in the amount specified by the authorized Forest officer during the period of operation, failing to timely reimburse the Forest Service for the cost of abating an emergency, and failing to comply with any term included in a lease, stipulation, or approved surface use plan of operations relating to the protection of a threatened or endangered species.

(2) *Suspension of a surface use plan of operations.* When the noncompliance is resulting in an imminent danger to public health or safety or in irreparable resource damage, the authorized Forest officer shall suspend approval of the surface use plan of operations, in whole or in part.

(i) A suspension will remain in effect until the operator comes into compliance with the applicable requirement(s) or standard(s) identified in the notice of noncompliance.

(ii) The authorized Forest officer shall serve decisions suspending a surface use plan of operations upon the operation in person, by certified mail, or by telephone. However, if notice is initially provided in person or by telephone, the authorized Forest officer shall send the operator written confirmation of the decision by certified mail.

(iii) The authorized Forest officer shall immediately notify the appropriate Bureau of Land Management office of a suspension of an operator's surface use plan of operations.

(3) *Abatement of emergencies.* When the noncompliance is resulting in an emergency, the authorized Forest officer may take action as necessary to abate the emergency. The total cost to the Forest Service of taking actions to abate an emergency becomes an obligation of the operator.

(i) Emergency situations include, but are not limited to, imminent dangers to public health or safety or irreparable resource damage.

(ii) The authorized Forest officer shall promptly serve a bill for such costs upon the operator by certified mail.

§ 228.113 Material noncompliance proceedings.

(a) *Initiation of proceedings.* The compliance officer shall promptly evaluate a referral made by the authorized Forest officer pursuant to § 228.112(b)(1) of this subpart. If the compliance officer agrees that there is adequate evidence to support a reasonable belief that an operator has failed to come into compliance with the applicable requirement(s) or standard(s) identified in a notice of noncompliance by the deadline specified in the notice, or an extension approved by the authorized Forest officer, and that the noncompliance may be material, the compliance officer shall initiate a material noncompliance proceeding.

(1) *Notice of proceedings.* The compliance officer shall inform the operator, and if the operator does not hold all the interest in the lease, all lessees, and assignees of the material noncompliance proceedings by certified mail, return receipt requested.

(2) *Content of notice.* The notice of the material noncompliance proceeding shall include the following:

(i) The specific reclamation requirement(s) or other standard(s) of which the operator may be in material noncompliance;

(ii) A description of the measures that are required to correct the violation;

(iii) A statement that if the compliance officer finds that the operator is in material noncompliance with a reclamation requirement or other standard applicable to the lease, the Secretary of the Interior will not be able to issue new leases or approve new assignments of leases to the operator, any subsidiary or affiliate of the operator, or any person controlled by or under common control with the operator until the compliance officer finds that the operator has come into compliance with such requirement or standard; and

(iv) A recitation of the specific procedures governing the material noncompliance proceeding set forth in paragraphs (b) through (e) of this section.

(b) *Answer.* Within 30 calendar days after receiving the notice of the proceeding, the operator may submit, in person, in writing, or through a representative, an answer containing information and argument in opposition to the proposed material noncompliance finding, including information that raises a genuine dispute over the material facts. In that submission, the operator also may:

(1) Request an informal hearing with the compliance officer; and

(2) Identify pending administrative or judicial appeal(s) which are relevant to the proposed material noncompliance finding and provide information which shows the relevance of such appeal(s).

(c) *Informal hearing.* If the operator requests an informal hearing, it shall be held within 20 calendar days from the date that the compliance officer receives the operator's request.

(1) The compliance officer may postpone the date of the informal hearing if the operator requests a postponement in writing.

(2) At the hearing, the operator, appearing personally or through and attorney or another authorized representative, may informally present and explain evidence and argument in opposition to the proposed material noncompliance finding.

(3) A transcript of the informal hearing shall not be required.

(d) *Additional procedures as to disputed facts.* If the compliance officer finds that the answer raises a genuine dispute over facts essential to the proposed material noncompliance finding, the compliance officer shall so inform the operator by certified mail, return receipt requested. Within 10 days of receiving this notice, the operator may request a fact-finding conference on those disputed facts.

(1) The fact-finding conference shall be scheduled within 20 calendar days from the date the compliance officer receives the operator's request, unless the operator and compliance officer agree otherwise.

(2) At the fact-finding conference, the operator shall have the opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront the person(s) the Forest Service presents.

(3) A transcribed record of the fact-finding conference shall be made, unless the operator and the compliance officer by mutual agreement waive the requirement for a transcript. The transcript will be made available to the operator at cost upon request.

(4) The compliance officer may preside over the fact-finding conference or designate another authorized Forest officer to preside over the fact-finding conference.

(5) Following the fact-finding conference, the authorized Forest officer

who presided over the conference shall promptly prepare written findings of fact based upon the preponderance of the evidence. The compliance officer may reject findings of fact prepared by another authorized Forest officer, in whole or in part, if the compliance officer specifically determines that such findings are arbitrary and capricious or clearly erroneous.

(e) *Dismissal of proceedings.* The compliance officer shall dismiss the material noncompliance proceeding if, before the compliance officer renders a decision pursuant to paragraph (f) of this section, the authorized Forest officer who made the referral finds that the operator has come into compliance with the applicable requirements or standards identified in the notice of proceeding.

(f) *Compliance officer's decision.* The compliance officer shall base the decision on the entire record, which shall consist of the authorized Forest officer's referral and its accompanying statement of facts and exhibits, information and argument that the operator provided in an answer, any information and argument that the operator provided in an informal hearing, and the findings of fact if a fact-finding conference was held.

(1) *Content.* The compliance officer's decision shall state whether the operator has violated the requirement(s) or standard(s) identified in the notice of proceeding and, if so, whether that noncompliance is material given the requirements of 30 U.S.C. 226(g), the stipulations included in the lease at the direction of the Forest Service, the regulations in this subpart or an approved surface use plan of operations. If the compliance officer finds that the operator is in material noncompliance, the decision also shall:

(i) Describe the measures that are required to correct the violation;

(ii) Apprise the operator that Secretary of the Interior is being notified that the operator has been found to be in material noncompliance with a reclamation requirement or other standard applicable to the lease; and

(iii) State that the decision is the final administrative determination of the Department of Agriculture.

(2) *Service.* The compliance officer shall serve the decision upon the operator and, if the operator does not hold all of the interest in the applicable lease, upon all lessees and assignees by certified mail, return receipt requested. If the operator is found to be in material noncompliance, the compliance officer also shall immediately send a copy of the decision to the appropriate Bureau of Land Management office.

(g) *Petition for withdrawal of finding.* If an operator who has been found to be in material noncompliance under the provisions of this section believes that the operations have subsequently come into compliance with the applicable, requirement(s) or standard(s) identified in the compliance officer's decision, the operator may submit a written petition requesting that the material noncompliance finding be withdrawn. The petition shall be submitted to the authorized Forest officer who issued the operator the notice of noncompliance under § 228.112(a) of this subpart and shall include information or exhibits which shows that the operator has come into compliance with the requirement(s) or standard(s) identified in the compliance officer's decision.

(1) *Response to petition.* Within 30 calendar days after receiving the operator's petition for withdrawal, the authorized Forest officer shall submit a written statement to the compliance officer as to whether the authorized Forest officer agrees that the operator has come into compliance with the requirement(s) or standard(s) identified in the compliance officer's decision. If the authorized Forest officer disagrees with the operator, the written statement shall be accompanied by a complete statement of the facts supported by appropriate exhibits.

(2) *Additional procedures as to disputed material facts.* If the compliance officer finds that the authorized Forest officer's response raises a genuine dispute over facts material to the decision as to whether the operator has come into compliance with their requirement(s) or standard(s) identified in the compliance officer's decision, the compliance officer shall so notify the operator and authorized Forest officer by certified mail, return receipt requested. The notice shall also advise the operator that the fact finding procedures specified in paragraph (d) of this section apply to the compliance officer's deicision on the petition for withdrawal.

(3) *Complaince officer's decision.* The compliance officer shall base the decision on the petition on the entire record, which shall consist of the operator's petition for withdrawal and its accompanying exhibits, the authorized Forest officer's response to the petition and, if applicable, its accompanying statement of facts and exhibits, and if a fact-finding conference was held, the findings of fact. The compliance officer shall serve the decision on the operator by certified mail.

(i) If the compliance officer finds that the operator remains in violation of requirement(s) or standard(s) identified in the decision finding that the operator was in material noncompliance, the decision on the petition for withdrawal shall identify such requirement(s) or standard(s) and describe the measures that are required to correct the violation(s).

(ii) If the compliance officer finds that the operator has subsequently come into compliance with standard(s) identified in the compliance officer's decision that the operator is in material noncompliance, the compliance officer also shall immediately send a copy of the decision on the petition for withdrawal to the appropriate Bureau of Land Management office.

(h) *List of operators found to be in material noncompliance.* The Deputy Chief, National Forest System, shall compile and maintain a list of operators who have been found to be in material noncompliance with reclamation requirements and other standards as provided in 30 U.S.C. 226(g), the regulations in this subpart, a stipulation included in a lease at the direction of the Forest Service, or an approved surface use plan of operations, for a lease on National Forest System lands to which such standards apply. This list shall be made available to Regional Foresters, Forest Supervisors, and upon request, members of the public.

Notice of Decisions

§ 228.114 Additional notice of decisions.

(a) The authorized Forest officer shall promptly post notices provided by the Bureau of Land Management of:

(1) Competitive lease sales which the Bureau plans to conduct that include National Forest System lands;

(2) Substantial modifications in the terms of a lease which the Bureau proposes to make for leases on National Forest System lands; and

(3) Applications for permits to drill which the Bureau has received for leaseholds located on National Forest System lands.

(b) The notice shall be posted at the offices of the affected Forest Supervisor and District Ranger in a prominent location readily accessible to the public.

(c) The authorized Forest officer shall keep a record of the date(s) the notice was posted in the offices of the affected Forest Supervisor and District Ranger.

(d) The posting of notices required by this section are in addition to the requirements for public notice of decisions provided in § 228.104(c) (Notice of decision), and § 228.106 (Review of surface use plan of operations) of this subpart.

PART 261—PROHIBITIONS

1. The authority citation for Part 261 would continue to read as follows:

Authority: 16 U.S.C. 551; 16 U.S.C. 472; 7 U.S.C. 1011(f); 16 U.S.C. 1246(i); 16 U.S.C. 1133(c)-(d)(1).

Subpart A—General Prohibitions

2. Amend § 261.2 by adding a new definition to read as follows:

§ 261.2 Definitions.

"Operating plan" means a plan of operations as provided for in 36 CFR Part 228, Subpart A, and a surface use plan of operations as provided for in 36 CFR Part 228, Subpart E.

Date: January 13, 1989.

Richard E. Lyng,

Secretary of Agriculture.

[FR Doc. 89-1252 Filed 1-19-89; 8:45 am]

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federal register

Monday
January 23, 1989

Part VI

Department of Agriculture

Forest Service

36 CFR Parts 211, 217, 228, 251 and 292
Appeal of Decisions Concerning the National Forest System; Final Rule

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Parts 211, 217, 228, 251 and 292

Appeal of Decisions Concerning the National Forest System

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: This rule revises Departmental policies and procedures by which individuals or groups may appeal decisions made by Forest Service officials concerning the management of the National Forest System. The Forest Service is replacing its current administrative appeal regulation at 36 CFR 211.18 with two distinct processes for obtaining administrative review of decisions. One rule, 36 CFR Part 251, Subpart C, is limited to appeal of decisions regarding written instruments authorizing occupancy and use of National Forest System lands, except contracts subject to the Contracts Disputes Act, and is available to certain applicants for and holders of such authorizations. The second rule, 36 CFR Part 217, offers any citizen or organization a process for obtaining review of decisions relating to land and resource management plans, projects, and activities. The changes result from a comprehensive review of the current rule as required by Departmental Regulation 1512–1, consideration of suggestions received during that review from appellants and Forest Service officials, analysis of public comment, and consideration of suggestions from other government officials on the proposed rule as published in the **Federal Register** of May 16, 1988 (53 FR 17310). The intended effect of the rule is to simplify the appeal process and to provide appeal procedures that are commensurate with the nature and type of decision being disputed.

EFFECTIVE DATE: February 22, 1989.

FOR FURTHER INFORMATION CONTACT: Kathryn C. Hauser, Program Analyst, National Forest System, Forest Service, U.S. Department of Agriculture, 202–382–9346.

SUPPLEMENTARY INFORMATION:

Background

The Forest Service, USDA, is responsible for managing 191 million acres of National Forest, National Grassland, and other land known collectively as the National Forest System.The Chief of the Forest Service, through a line organization of Regional Foresters, Forest Supervisors, and District Rangers, manages the surface resources, and, in some instances, the subsurface resources, of these lands.

The Department provides a process by which individuals or groups may appeal National Forest System management decisions, currently set forth at 36 CFR 211.18. During the period Fiscal Years 83 to 85 the Forest Service received an average of 535 appeals per year, of which 235 reached the office of the Chief for review. In FY 88, 1,609 appeals were received of which 508 were directed to the Chief. Most of the latter, 306 in number, were appeals relating to the approval of Forest level land and resource management plans prepared under the provisions of the National Forest Management Act of 1976 (NFMA), and its implementing regulation at 36 CFR Part 219. Relatively few initial decisions of the Chief are appealed to the Secretary, only 10 during FY 88. Review officials are guided in the appeal process by 36 CFR 211.18, and by Forest Service policy and procedures as set forth in the Forest Service Manual (FSM 1570) and accompanying Handbook (FSH 1509.12).

Introduction

There is no statutory requirement that the Forest Service provide a grievance or appeal procedure. Rather, at its own discretion and initiative, the agency, since 1906, has provided some kind of process by which permittees and the general public could challenge forest officer decisions. In fact, until the enactment of several environmental statutes in the 1960's and 70's, the appeal process was about the only formal mechanism the public could utilize to influence agency decisionmaking. Appeal procedures were first codified in 1936 (1 CFR Part 1092, August 15, 1936). During the intervening half century, the Forest Service has periodically revised the appeal regulations responding to changing law and policy, and to its own experiences under the procedures existing at the time. During this period, the rules have shifted alternatively back and forth from informal to formal in nature, and from wholly internal administrative review to review and adjudication by independent boards.

Since 1965 the appeal regulation has been revised three times, the latest in 1982 after the agency conducted a major review of the then current regulation (36 CFR 211.19 promulgated in 1977) to comply with Executive Order (EO) 12044, the first EO to require review of existing regulations on a 5-year cycle. The result was a revised appeal procedure at 36 CFR 211.18 (48 FR 13425, March 31, 1983), the current rule.

The Forest Service announced its decision to review the current appeal regulation in the Semi-Annual Regulatory Agenda published April 27, 1987 (52 FR 14144). On May 20, 1987, the agency issued a press release announcing the impending review, and informed the public that their comments would be solicited. Subsequently, on June 11, 1987, a **Federal Register** notice (52 FR 22348) was published seeking public input about how well the current appeal process meets public needs, is likely to do so in the future, and what people like and dislike about the process. Additionally, the Forest Service issued 928 letters inviting public comment, and conducted 106 interviews with various line and staff officers throughout the agency.

The review revealed that the appeals process has served the agency and the public with varying degrees of success for many years. However, the process as it has evolved during the last few years is not the simple, quick, informal process that the agency originally intended it to be. Instead, it has become a significant generator of paperwork and a time-consuming, procedurally onerous, and costly effort, trading off resources and energies that otherwise might be directed to substantive on-the-ground resource management needs. Based on these findings, the Forest Service concluded that the appeals process needed adjustment to better serve the public and the agency. Accordingly, the agency published proposed rules revising the appeal procedure in the **Federal Register** of May 16, 1988 (53 FR 17310).

Analysis of Public Comment

In addition to publishing the proposed rules in the **Federal Register**, the Forest Service mailed 21,426 letters to known interested parties inviting comment on the rule. Also, agency personnel conducted 193 briefings for groups around the country. In response to these efforts, the Forest Service received 921 letters postmarked on or before the July 15 end-of-comment period, and more than 100 late responses, all of which were considered. Eighteen different types of respondents, as shown below, provided input:

Respondent	Number of Letters
Federal agencies, excluding FS	5
State agencies	16
City/Municipal government	4
Federal elected officials	4
State elected officials	3
County elected officials	6
City elected officials	1
Indian tribal councils	2

Respondent	Number of Letters
Professional societies	1
Conservation/environmental/ preservation organizations	127
Civic groups	4
Businesses/business groups	23
Timber industry organizations	55
Associations and unions	41
Riding and hiking interests	5
Hunting and sports groups	4
Other organizations	6
Individuals and families	614
Total timely respondents	921
Total untimely respondents	104
Total	1025

Many letters seemed campaign inspired, using similar or identical language to identify and describe respondents' respective interests or concerns, frequently referring to or referencing other respondents' statements and including them as enclosures. While there was a great deal of common information noticeable in these letters, much of this shared information was erroneous or misleading. The result was considerable comment based on misunderstanding, an indication some respondents were not well apprised about the rule itself or the preamble which presented the rationale behind the proposals. However, many of the comments received were well-informed, constructive, and well-written.

Comments substantially focused on the informal decision review process proposed for 36 CFR Part 217. These comments centered on 11 major areas of concern, constituting more than three-quarters of the total comment. These areas were: purpose and scope, notice of decision, appealable/nonappealable decisions, levels of review, filing procedures/time extensions, responsive statements, stays, open/closed communications, intervention, oral presentations, and filing fees.

After the public comment period closed, and prior to the drafting of this final rule, the Subcommittee on Family Farms, Forests and Energy, of the House Committee on Agriculture, held an oversight hearing on the proposed rule. In addition, the staff of the Senate Committee on Agriculture, Nutrition, and Forestry requested a briefing. The suggestions that arose from the hearing and briefing, along with the public comment received on the proposed rule, whether timely or late, were reviewed and have been fully considered in preparation of these final rules.

Responses received are available for review at the office of the Staff Assistant for Operations, National Forest System, Forest Service, USDA, Room 4211, South Agriculture Building, 14th and Independence Avenues SW., Washington, DC 20013, telephone (202) 382–9349.

General comments

As proposed, two separate processes would be created, geared to the type of decision at issue. One process, to be codified at 36 CFR Part 251, provides for appealing decisions when the appeal is a legally-based grievance arising from a past action that may be affected by the current and disputed decision. This appeal process would afford instrument holders or applicants a degree of process appropriate to the specific nature of their legal, business-type, relationship with the agency.

The second appeal process, to be codified at 36 CFR Part 217, involves decisions made during the planning and decisionmaking process and documented according to the National Environmental Policy Act (NEPA) and National Forest Management Act (NEMA) implementing instructions. It affords interested individuals and organizations who do not have a business-type relationship with the agency one more opportunity, following and in addition to their input during the planning process, to seek agency oversight and reconsideration at a higher level. It emphasizes public participation features currently found in planning and decisionmaking for future actions.

In addition to comments on specific sections of the proposed rules, many respondents expressed concern that: (1) Rights of appeal to which the public is legally entitled are being curtailed; and (2) the public is being divided into two classes, with some of the public relegated to second class status, with attendant diminution of legal rights.

In the first instance, many respondents believed any agency appeal regulation must afford the procedural rights of due process guaranteed by the Fifth Amendment of the Constitution that are required when property rights are affected. Other respondents believed that the appeal regulation must contain all the features of a formal Administrative Procedure Act (APA) process, including a formalized hearing procedure, an impartial judge, and provision for building a record. Some also believed that the appeal regulation is a right specifically provided by statute. There was support expressed for "streamlining" the process, but not to the extent of eliminating features considered to constitute due process (such as responsive statements and consequent replies, intervention, and oral presentations).

In the second instance, respondents' concerns about the rules creating two unequal classes of appellants centered on the perceived reduction of input opportunities for those using 36 CFR Part 217 procedures, although some respondents also felt that 36 CFR Part 251 eliminated input opportunities as well. Those who do not have a legal relationship with the Forest Service do not see the legal relationship as an adequate basis for modifying the kind of "access to process" necessary for review of management decisions.

Response: Respondents who urged that the APA must be followed failed to grasp the distinction between the types of due process intended by that Act. When an appeal procedure is mandated by statute, then specific, formalized elements of due process detailed in the APA must be applied. When an appeal procedure is not mandated by statute, but rather provided voluntarily by an agency, as this one is, then only the broad principles of the APA apply. In other words, the procedures made available by the APA for notice and opportunity to be heard must be applied fairly. Any process voluntarily deemed as "due" must then be followed by the agency which institutes it.

The procedures being adopted are based on the type of decision that has been made, and the type of relationship that exists between parties to the decision and the agency. The rules are not based on a concept that a certain class or party should have more or less access to a process for having a decision reviewed. This fundamental concept on which the two rules are based was thoroughly discussed in the supplementary information to the proposed rule, and is not presented again in this response (53 FR 17310). See Comment and Response under § 217.1 for further discussion.

Comment: The proposed rule provoked considerable general comment, largely critical, on the relationship between the Forest Service and the public. The public's concerns in this area can be described in three categories: (1) Those indicating that the proposed changes limit public input in the decision-making process; (2) arguments that public involvement prior to the decision should not preclude a readily available means to protest the decision; and (3) those reflecting a feeling that the Forest Service was operating in bad faith.

Comments from those expressing concern that the Forest Service was limiting public input were often phrased to indicate that the public sees the appeals process as one facet of public

involvement. There are a substantial number of people who feel that by tightening the appeals rules, the Forest Service is trying to close a legitimate avenue of involvement.

The second group of respondents see appeals as a separate category from other kinds of public involvement, but feel that public involvement prior to decision making is not a basis to preclude redress through appeal. Several argued that, had public involvement been operating as envisioned under the National Environmental Policy Act (NEPA) and NFMA, the flood of planning-related appeals that have been so slow to resolve would never have occurred.

The third group of respondents reacted to the proposed changes more broadly in terms of trust. Comments in this category expressed distrust of the agency's decisionmaking. Some of these respondents described the agency as corrupt, deserving suspicion, hypocritical, or biased toward the timber industry.

Response: We agree that the appeals process can be viewed as a facet or type of public involvement, but appeals are a very limited means of public involvement compared to the public's opportunity to provide input in the predecisional stages. Not all the public is involved through an appeal to influence the disputed decisions; only appellants and intervenors are. The rest of the public very seldom become involved after an appeal is filed.

The Forest Service does not seek through the revised procedures to limit public involvement in decisionmaking. To the contrary, the rules emphasize public involvement prior to a decision being made, and provisions are incorporated into the rules that create explicit opportunities for conflict resolution before a decision is implemented and while a decision is being reviewed. Additionally, the final rule at 36 CFR Part 217 restores intervention as a procedural process users have been accustomed to in the past.

Nevertheless, we believe that public participation and involvement in planning and decisionmaking is more effective prior to making the actual decision than afterwards, if for no other reason than more people participate. However, public involvement prior to making a decision should not limit access to a decision review process, and we had no intent to do so. Having a decision review process is actually an incentive for the agency to commit to public involvement prior to making decisions.

The "trust" and "bad faith" comments are legitimate, if troubling, expressions of public concern. In releasing the proposed rules, the Forest Service went on record to say that the agency sincerely wants to make better decisions and involve the public more effectively and to improve its performance in handling appeals. The agency has every intention of doing this and hopes that all its constituent publics will monitor our performance and thus help the agency earn public trust.

The above three categories of comment are also responded to in the discussion of specific sections of 36 CFR Part 217, since many respondents brought up similar concerns and targeted them at specific sections.

Oral Presentations

The proposed rules at Part 217 would eliminate the oral presentation procedure, but it emphasizes the authority of the Deciding and Reviewing Officers to discuss issues with requesters and others, and to hold meetings. Currently, appeallants and intervenors must request an oral presentation when they file their notice of appeal/request for intervention; if granted, it is usually held after the record is received by the Reviewing Officer.

Comments: A few respondents supported the elimination of oral presentations, but those who did gave no reasons for their support, they simply listed a number of features that they favored.

Those who opposed the proposed change described the advantages of oral presentations, including the following: Communicates in a way that is impossible to achieve on paper; clarifies issues and positions; permits "give and take" between the parties; helps verify the sincerity of each party's beliefs; gets at the "heart" of the appeal; enchances dialogue leading to resolution of disagreements; permits viewing physical evidence; and reduces angry feelings triggered by reading the impersonal documents.

Several comments noted the dual standard which allows oral presentations under Part 251, but not under Part 217.

Some respondents said that the lack of oral presentations will lead to more litigation because fewer appeals will be settled to appellants' satisfaction. Others feared that flawed decisions would result from eliminating communications with appellants such as responsive statements and oral presentations afford. And, one respondent was disappointed with the apparent lack of "openness" signaled by the rule; while another feared that the change signifies the elimination of all public involvement meetings.

One claimed the oral presentation is "less time consuming" than extracting information "from the review file."

Response: Opportunities for and references to more openness, direct contact between Deciding Officers and participants, and resolution of issues during a review abound in the proposal and are explained in the preamble discussion.

While the formal feature of oral presentations permitted under the current rule would be eliminated under Part 217, the proposed process features and promotes options for informal meetings and discussions. In addition, the final rule includes a new provision that any of the parties may request such meetings at any time during the appeal. The benefits of what is called an "oral presentation" under the current rule still accrue to everyone involved. Consequently, the final rule regarding oral presentations, remains as proposed.

Filing Fees

For the reasons stated in the supplementary information to the proposed rule (53 FR 17314), a requirement for filing fees was not included in the proposed rules. However, public comment was solicited on the possibility of imposing filing fees, because the fee idea as a requisite part of the appeals process is a recurring one. The increased number of appeals filed during the past year or two leads many observers to believe that the administrative appeals process provided under 36 CFR 211.18 is being abused by groups and individuals to disrupt resource programs, especially timber sale and harvest in some areas of the country. In response, many groups and individuals have proposed that a significant filing fee be imposed to cover the cost of processing an appeal, a strategy designed to prevent "frivolous" appeals.

Comments: Public comment on the filing fee idea was 3 to 1 opposed. Most respondents felt that imposing fees of any sort would be counter to the historical objectives of the Department and the Forest Service in providing the public an open, informal administrative appeals process. Additionally, they thought that it would be costly to taxpayers, and only result in further complicating the appeals process. A few respondents questioned whether the agency has statutory authority to require a fee as a condition of filing an appeal if the objective is to recover costs. Others felt that fees, whether to recover costs

or a modest filing charge, would discriminate against parties not able to afford the charges, and thus give rise to some sort of waiver policy. Some respondents cited beliefs that filing fees should be unnecessary, given the thrust of the revised rules to make better decisions earlier so that sufficient time is available for appeal review without holding activities such as timber sales and subsequent harvests in abeyance. Supporters of filing fees generally cited a need for a mechanism to combat, from their perspective, the "frivolous" appeals that delay resource activities, particularly the sale and harvest of timber from many National Forest areas. Other respondents also suggested that a bond be required where an economic hardship on a third party would be created by a decision to stay implementation of a project or activity.

Response: Public comment about imposing filing fees can be divided into two areas of concern, one dealing with policy considerations, the other with legal authorities. The following discussion examines the implications of these concerns and serves as the basis for the decision not to include filing fees as a requisite part of the administrative appeal processes established in this final rulemaking.

1. *Possible impact on NEPA procedures.* The Forest Service administrative appeal regulation is closely linked to fulfillment of public notice and opportunity to comment requirements of the NEPA implementing regulations (40 CFR 1506.10). Under the NEPA regulations, the Forest Service has been permitted to issue decision documents along with the environmental disclosure documents because the administrative appeal procedure gives the public opportunity to challenge a decision. The likelihood that filing fees could discourage use of the appeal process calls to question whether the Forest Service could continue to issue environmental disclosure and decision documents simultaneously.

2. *Impact of substantial fees.* Historically, the Forest Service has invited and encouraged public use of the administrative appeal process, consciously and successfully developing a public expectation that it may freely gain access to decisionmakers through the appeals process. The process has served well, albeit slowly at times, as a policy review mechanism to test and adjust agency direction. Substantial fees would operate to discourage appeals; as a result, the policy review mechanism would lose effectiveness with any decline in use of the process.

In defending agency action, government counsel often argue in litigation that plaintiffs must first exhaust their administrative remedies. Imposing substantial fees could lead to more direct filings in Federal District Courts, thus depriving the agency of opportunity to review and document its decision (through administrative appeal proceedings to show rational decisionmaking) prior to litigation. Imposing a substantial fee would also likely promote requests for a fee waiver procedure process (similar to Freedom of Information Act (FOIA) situations) and further complicate the administrative appeal process.

High fees also would tend to discriminate against individuals rather than organizations. While any nominal fee would discourage appeals by individuals who file non-specific appeals on numerous projects, imposing fees only for the purpose of limiting appeals affects all potential appellants without regard to subject matter or merit. As a matter of policy, other alternatives to limit the negative effects of appeals could be more effective, as for example, simplified processing, faster reviews, as well as improved public involvement prior to the decision.

3. *Inconsistency of fees with simpler, streamlined review process.* Initiating substantial fees would seem inconsistent with amending the existing appeal process for simplicity. The proposed regulation, 36 CFR Part 217, modifies existing administrative appeal features appellants have come to rely on or view as "due process protections." If the agency imposes substantial fees, appellants will expect more "due process" protections, such as right to confront and interrogate witnesses, right to several levels of appeal, right to responsive statements, etc.

Once an appellant has invested a substantial filing fee, settlement for less than complete relief may be less likely, and the tendency to litigate an adverse and costly appeal decision will likely increase.

4. *Statutory authority for fees.* There is no specific statutory authority for the Forest Service to require a fee as a condition for filing an appeal. However, the Independent Offices Appropriation Act, as revised (31 U.S.C. 9701 (1986)) might be considered authority for a reasonable fee. Under this Act, such charge is to be fair and based on the cost to the government, the value of the service, public policy or interest served, and other relevant facts. The agency has invited the public to utilize the appeals process, so it may be questionable whether its use by the public is a "service" to the public as contemplated by the Act.

A fee of $1,000, as proposed by some respondents, would probably exceed the scope of the Act, and would be far beyond fees imposed upon private parties by Federal District Courts ($120), U.S. Claims Court ($60), and Federal Circuit Courts ($100). Federal court fees are not based on costs of service, but on separate statutory authority to collect fees. However, these courts may award damages, costs, and attorney fees in favor of successful parties. It would appear that specific statutory authority for filing fees is needed so that substantial, high fees could be insulated from serious judicial scrutiny.

Other formal administrative bodies within the Department of Agriculture, such as the Agriculture Board of Contract Appeals, and the Judicial Office which holds all formal APA hearings for the Department, impose no filing fees or require bonds. Neither are fees imposed in the "protest" procedure for certain decisions involving land and resource management plans of the Bureau of Land Management, Department of the Interior. Moreover, limiting fees to only certain types of activity, such as timber sale and related harvest activity, might be deemed arbitrary and capricious.

5. *Fees based on cost recovery vs. minimum filing fee.* The Forest Service appeals workload nearly doubled from 874 cases in FY 87 to 1,609 cases in FY 88. No cost breakdown is available for 1988, but for the previous 2 years, direct costs to process appeals during those years averaged $5,304,952, or about $5,424 per case. Facing this situation, fees based on cost recovery would place the administrative appeal process beyond the reach of most individuals and small organizations, and thus undermine the basis for having an appeal process. A fee collection program involving a nominal fee for administrative appeals, based on other experiences in fee collection activities elsewhere in the agency, would cost about $35 per appeal. For 1988, this would have amounted to only $56,315. The administrative burden of collecting fees would not be worth the small amount collected. Therefore, for the reasons set forth, the final rule does not include provisions for fee collection in either 36 CFR Part 217 or 251.

Specific comments

The following summarizes the major comments and suggestions received on the proposed revision of 36 CFR Part 217, and the Department's response to these comments. Although reviewers were asked to key their comments to specific sections, the majority did not

respond in this manner. Also, many comments embodied multiple sections. Where this is the case, our response to the public comment similarly embodies multiple sections. Many respondents pointed out that the proposed rule was hard to follow. Thus, the final rule has been rearranged to more closely follow the steps in the process and many of the headings have been retitled to better describe their contents. However, the publics' comments and our responses are keyed to the section numbers and headings of the proposed rule document.

Section 217.1 Purpose and scope.

This section stipulated that this is an informal review process and is tied to the NEPA process. Only decisions documented as a consequence of agency compliance with NEPA procedures are reviewable under this rule. The proposed rule emphasized public participation and dispute resolution, and deemphasized process and procedures.

Comments: Some respondents thought that making two rules out of the current one rule was unfair because due process aspects retained in 36 CFR Part 251 are not provided for in 36 CFR Part 217. These respondents felt that they are just as entitled to due process in Part 217 as are permit holders under Part 251. They also commented that decisions under 36 CFR Part 251, specifically timber and mining activities, affect more than just the permit holder and should be appealable by other interested and affected parties.

Response: Some misinformation persists concerning what would be reviewable under Part 217 versus what would be appealable under Part 251. Decisions concerning mining activities authorized by appropriate written instruments are not confined exclusively to Part 251 as some respondents thought. If such activities involve environmental analysis and documentation prior to a decision to issue or modify an authorization, review of the decision would be available under 36 CFR Part 217. As is currently the case, disputes between the Forest Service and a timber purchaser arising from administration of a timber sale contract will continue to be administered under 7 CFR Part 24, the Contract Disputes Act.

Those respondents who feel they have the same rights to due process as holders of written instruments issued by the Forest Service need to understand better the fundamental basis on which the two-rule process was developed and proposed. Elements of due process are incorporated in the Part 251 regulations because of the legal and business relationship involved between the holder of the written instrument and the Forest Service. As noted in the preamble to the proposed rule, this relationship does not exist between the Forest Service and individuals and groups who disagree with a resource allocation or management decision. Therefore, it is not believed necessary to provide the same degree of due process as provided in Part 251 for appealing a management decision under Part 217. Moreover, the publics who wish to dispute a management decision under Part 217 do not have a legal right to administrative appeal. They do have a legal right to timely notice of a decision, but access to an appeals process and the right to be heard in a prompt, objective review of the decision are provided at the administrative discretion of the Forest Service.

This Department does not believe it is in the best interests of National Forest System management or public policy to disrupt or delay management activities over long periods of time. It is in the public's interest to have a timely mechanism for reviewing decisions and either abandoning the management action or proceeding to implementation.

Therefore, the final rule retains two separate rules, emphasizes the multiple opportunities prior to review of a decision for the public to influence decisionmaking, and points out the role of constructive dialogue between participants during the review. However, in recognition of the public comment, some elements of due process in 36 CFR Part 251 have been incorporated into the final rule at 36 CFR Part 217. These are intervention and additional stay procedures. These are discussed under §§ 217.4 and 217.12 of this preamble.

Section 217.2 Applicability and effective date.

This section would allow for the continuance of appeals that have already been filed under the current rules at 36 CFR 211.16, 211.18, 228.14, and 292.15. No comments were received on this section. Therefore, this section is retained as proposed but it is recoded as § 217.19.

Section 217.3 Definitions and terminology.

This section provided definitions for the terms used in the rule.

Comments: The only comment received on this section was from seven respondents who objected to the words "request" and "requester," stating it was confusing and appeared to set up a class distinction.

Response: It was not the intent of this rule to set up a class distinction. The intent in using the words "request" and "requester" was to make a distinction between the more formal procedures in 36 CFR Part 251 and the simpler review process of Part 217. However, because respondents found these words confusing, the final rule restores the currently utilized terms of "appeal," "appellant," and "intervenor." This section has been modified to reflect this change and conforming amendments are made elsewhere in the rule for consistency throughout the rule. This section is recoded in the final rule as § 217.2.

Section 217.4 Eligible participants.

The proposed rule established a review process accessible to a virtually unlimited range of interests. The only limitation was that Federal entities, as well as Forest Service employees, would be excluded from participation in this review process.

Under the current rule, anyone can request to intervene at any time during the process. The proposed rule eliminated intervention as a formal process but provided for accepting written comments into the review file from any interested person or organization.

Comments: The respondents to this section represented two points of view. One concerned exempting Federal organizations and Forest Service employees from using this rule. These respondents pointed to the possible need for Federal organizations to have access to this review process as an alternative to existing issue-resolution mechanisms that might prove unproductive in occasional instances. Some respondents also believed that a Forest Service employee who has a private property interest in land impacted by a management decision should be able to request a review under this rule.

The other view concerned intervention. The majority of these respondents felt they have a "right" to intervene as they have been accustomed to under 36 CFR 211.18. Consequently, they want that "right" retained. However, some respondents added the recommendation that time delays to permit intervention should not be permitted.

Response: Means for resolving disagreements between Federal agencies concerning proposed major Federal actions that might cause unsatisfactory environmental effects are available through the Council on Environmental Quality (CEQ) (40 CFR Part 1504). Moreover, Federal agencies have informal mechanisms through their agency heads to bring their concerns to

the attention of the Forest Service. No purpose would be served by providing agencies an additional administrative process to challenge decisions. Therefore, the final rule retains the exclusion.

Forest Service employees having a private property interest in land subject to impact from a management decision would have access to appeal under 36 CFR Part 251. Therefore, the final rule retains the exclusion of employees from challenges to management decisions.

In the proposed rule, the Forest Service viewed intervention as a structured process for involvement when rights have to be protected, e.g., rights of parties that may be injured by an appeal decision. However, injury was not the focus of proposed 36 CFR Part 217. Rather, it was designed to review information developed through National Environmental Policy Act (NEPA) and National Forest Management Act (NFMA) planning activities and attendant public participation. The intent of 36 CFR Part 217 was to provide an optional final step, through appeal, in this decisionmaking process to review the kind and quality of information in the environmental documentation, including the decision itself. If that information is inadequate for a Reviewing Officer to substantiate the decision, the decision would likely not stand on review. The agency welcomes all forms of information germane to the decision and its supporting documentation. But, formal intervention as practiced under the current appeal rule and retained under the proposed rule for Part 251 was not considered appropriate to this information assessment step, anymore than it is considered suitable as a structured mechanism during the earlier steps in the planning and decisionmaking process. The agency continues to believe that providing all the "formal" embellishments of intervention is unnecessary and counterproductive to achieving the initial goals of offering a separate, less formal process for review of management decisions.

However, having considered the public comment which strongly favored retention of intervention, the final rule provides for a simpler form of intervention than does the current rule or in Part 251. Under the final rules at Part 217, intervention will be granted if requested within the time period provided, intervenors can provide comments on issues raised in the notice of appeal, have the right to receive and comment on additional information requested by the Reviewing Officer, and can participate in resolution meetings. Unlike the current appeal rules, intervenors under Part 217 cannot intervene at any time, request a stay, or continue an appeal if the appellants withdraw an appeal. The agency believes that this form of intervention both meets the concerns of those who were concerned about the loss of stature in and access to the appeals process and still contributes achieving an unarrayed, less formal review procedure, a major objective of this rulemaking process. A new section coded § 217.14 and titled "Intervention" addresses this change. Because intervention will be permitted, there is no need to provide for written comments by other individuals. Therefore, the provision has been deleted in the final rule. In addition, in the final rule, the section entitled "Eligible participants" is recoded and retitled § 217.6 Participants.

Section 217.5 Obtaining notice of decision.

The proposed rule required notice only through publishing a legal notice in a newspaper of general circulation in the area affected by the decision, and notice of certain other decisions in the **Federal Register**. The review period would begin with the date of publication.

Comments: A common perception by respondents was that notice in the **Federal Register** or a newspaper would replace the current practice of mailing a Decision Notice or Record of Decision to interested and affected persons. Respondents felt that anyone who had expressed interest in the decision should be notified in writing. Respondents mentioned the drawbacks of **Federal Register** notification, such as being time-consuming, not readily available to the general public, and expensive. Problems associated with newspaper notification included: The definition of general distribution; local people do not usually subscribe to regional papers; people outside the circulation area of a local newspaper would not have ready access to the notice; delays in notice because local rural newspapers are often weekly; Forests are often served by several newspapers.

Response: Motives for specifying legal notices were misinterpreted as trying to maintain secrecy, attempting to rush implementation of controversial projects, and reducing the ability of the general public to appeal decisions. The legal notice requirement was intended to be an *addition* to the notice requirements specified by the Council on Environmental Quality (CEQ) at 40 CFR 1506.6. And, the date of the published notice was intended to signify the start of the review period.

Because of this misunderstanding, this section has been rewritten to include common practice currently observed by the agency, applied to all decisions appealed under this rule. The rule also requries that **Federal Register** notice will be given on decisions that are considered to have effects of National concern, and appealable decisions made by the Chief. The requirement for legal notice has been made discretionary because it presented more problems than solutions. The appeal period will start on the day following when the decision document is signed and dated, as is currently the practice. Additionally, the final rule specifies that the decision will be mailed promptly so that those wishing to utilize the process will have the maximum time available to them.

This section has been retitled Giving notice of decisions subject to appeal.

Section 217.6 Decisions subject to review and Section 217.7 Decisions not subject to review.

Part 217 proposed a review process applicable to all decisions arising from a NEPA evaluation, and documented in a Record of Decision, Decision Notice, or Decision Memo. It excluded all other decisions plus a list of exclusions similar to the current rule. Further, the proposal excluded catastrophic events from review when the Chief or Regional Forester believes it critical to move quickly with rehabilitation or salvage and publishes an exclusion to this effect in the **Federal Register**.

Comments: The majority of the comments dealt with these two sections as one subject; thus, we are responding in a similar manner.

Some respondents suggested that a proposed action should be appealable only on the basis that it is inconsistent with the Forest plan, thus narrowing the scope of review. Other respondents wanted a broader definition of what should be availlable for decision review They saw the narrowing of the process as restricting citizen oversight of decisions affecting National Forest management because administrative, policy, and procedural decisions are not covered by this review process. There was some concern voiced regarding which regulation (36 CFR Part 217 or 36 CFR Part 251) would apply for certain decisions and whether the Forest Service or the requester/appellant would make the choice.

Many respondents said decisions on catastrophic events should not be excluded from review. They said the Forest Service would abuse the

definition and slip in other things besides these natural events.

Response: Currently, appeal of rehabilitation activity decisions are covered by an interim rule at 36 CFR 211.16. Folding the broad provisions of this rule into the final rule eliminates a separate rule, but it retains the opportunity for the public to request review of decisions concerning rehabilitation activities unless the Chief or the Regional Forester, because of severity and time lines, makes a decision to exclude them, and publishes a notice to this effect in the **Federal Register.**

The notion for narrowing the scope of review to only whether a proposed action is in conformance with the Forest plan has a defect. First, some sort of review would be needed to determine whether the disputed action conformed to the Forest plan. We expect most actions would. What's critically important is: Does the decision to undertake the disputed action meet NEPA requirements? The action might conform to the plan but not NEPA. Therefore, the proposed action should not proceed until it is in compliance with both the Forest plan and NEPA. Thus, the final rule does not narrow the scope of review.

Policy-type administrative decisions were not included in the review process because they determine how the agency is to approach a task or situation. These policy decisions seldom require documentation of environmental impacts. Under the current rule, policy or procedural decisions have constituted only a miniscule proportion of appeals received. Other administrative avenues are open to the public to influence decisionmaking of this kind, and to request reconsideration, which would be more efficient than utilizing the appeal process. For example, many Forest Service policies and procedures are published in the Federal Register for comment. Additionally, notice of such comment opportunities is mailed to interested and affected persons and often also announced through press releases.

There was never any intent that the Forest Service would choose which rule would be applicable to a particular decision. The choice is up to the appellant to make. Each new rule, 36 CFR Part 217 and 36 CFR Part 251, clearly defines which kind of decision is covered by which rule.

The final rule retains the proposed inclusions and exclusions, but the sections are recoded and retitled § 217.3 Decisions subject to appeal and § 217.4 Decisions not subject to appeal.

Section 217.8 Levels of review available.

Under the proposed rule change, a second level of review was a discretionary decision by the Reviewing Officer at that level.

Comments: Many respondents objected to the concept of a one-level review process because: they felt it was designed for agency expediency at the individual's expense; it vested an inappropriate amount of power in one person; it did nothing to encourage or promote negotiated settlements; and it would lead to cursory and superficial review. And, while reducing the number of appeals, respondents saw the one level review as increasing the potential for more litigation.

The major concerns about the one-level review centered on District Ranger decisions. Respondents focused on the Forest Supervisor as final reviewing officer, doubting that the review could be objective because the project or activity (action) being appealed was in keeping with goals established by the Forest Supervisor and may have been undertaken with advice and supervision from the Supervisor's level.

The second area of concern over the one-level review process centered on concerns that the current second level was a vehicle to make upper levels of the Forest Service aware of local issues which have possible regional or national implications. Many respondents felt that the second review was also a chance to be heard by those who had a broader perspective of Forest Service policy and national issues; that it was a chance for the Chief to clarify policy to the field; and it was seen as a chance to make national organizations aware of local concerns.

Many found the idea of discretionary review unsatisfactory for a variety of reasons. There was concern that without specified decision criteria there would not be a fair way to determine if a second level was needed. Several respondents stated they felt they should automatically receive a second review. And some respondents stated that public controversy should be a reason for second review.

Considerable concern was expressed that the 15-day period to exercise discretion was insufficient, and that the 30-day second level review period would not permit adequate consideration, thereby causing the lower decision to stand by default.

Response: Although there were numerous comments on the need for two levels, the one-level review with discretionary review at the second level best fits the intent of the rule. It simplifies the process, improves the potential to process appeals in a timely manner, yet retains the option for a second review. Inherent in the process is the requirement for full and proper use of the NEPA process. The NEPA process requires Federal agencies to involve the public early and continuously throughout the decisionmaking process; thus a fair and open hearing on issues related to a decision are available. Lastly, the intent of the rule is dispute resolution by establishing stronger ties between the initial decisionmaker and the public, all in the overall interest of making better National Forest management decisions.

The public perceived the relationship between the Forest Supervisor and the District Ranger as being so close as to prevent an objective review of Ranger decisions by Forest Supervisors. Even though 82 percent of the District Ranger decisions currently appealed are resolved without a second level appeal, the final rule provides for a two-level appeal process for decisions made at the District Ranger level. However, second level review of a Ranger decision by the Regional Forester will not be automatic. It will have to be requested, and the review will be based solely on the existing record without additional submissions. The second level appeal decision will not receive further review.

In the final rule, a new paragraph (d) was added to clarify that Forest Supervisor's dismissal decisions are subject only to discretionary review, not to a second level appeal.

This section is recoded as § 217.7. The provisions detailing how discretionary review will work have been moved to a new section, § 217.17 Discretionary review, bringing into one place all references to discretionary review. In the proposed rule, these references were found in §§ 217.8, 217.13, 217.14, and 217.15. For response to additional comments on discretionary review see the discussion under § 217.15 Review decision.

Section 217.9 Filing procedures and timeliness; Section 217.10 Extension of time; Section 217.11 Content of a request for review.

The proposed rule eliminated the discretionary extension of time for filing a Statement of Reasons, while maintaining extension options for all Forest Service deadlines, except at the discretionary review level. The proposal required that the Statement of Reasons material be filed with the Request for Review. And, it included very specific direction on what must be included.

Comments: Public responses tended to link these three sections together. Many respondents felt that preparation of an appeal, including the complete statement of reasons, in the allotted 45 days could not be accomplished, and recommended provisions for extensions. Some claimed that the Forest Service was biased against individuals and volunteer organizations which would be working nights and weekends to provide the analysis, and be less likely to meet the 45-day limit than organizations which have paid staff. Several pointed out that extensions are needed in order to request and obtain needed data from the Forest Service. Others mentioned that, although they had been involved in the development of major projects, the Environmental Impact Statement preferred alternatives often change between draft and final, and that an entirely new review and analysis opportunity is therefore needed. Many pointed out that the proposed rules allow the Forest Service to grant itself extensions, and felt this was unfair, since the agency holds all the information and should be the best prepared to meet timeliness. Respondents mentioned that Forest Service failures to meet timelines under the current process are causing significant project delays and that the proposed rule perpetuates this situation.

Response: While this rule emphasizes dispute resolution, it is not intended to take the place of early and continuous public participation in the agency's NEPA-based planning and decisionmaking process. If the public is concerned about National Forest management matters, it has a responsibility to work with responsible officials in the development of various environmental documents prior to decisions being made that are subject to appeal under this rule. The final rule retains the 45-day filing period, with no extension permitted, for those appealing a decision on a project or activity. However, taking into consideration the public comment, the final rule has been modified to provide a 90-day filing period for those appealing a decision on a land and resource management plan approval, significant amendment, or revision, or on programmatic decisions documented in a Record of Decision. It should be noted that the longer appeal period does not change the effective date of the decision.

Additionally, the final rule has been modified to limit when the Forest Service can grant itself time extensions. Reviewing Officers will be permitted to extend the time of the review period only to request, acquire, and evaluate information needed to clarify issues, or to hold meetings to resolve issues.

Responding to public concerns that the new rule just perpetuates current Forest Service practice of not following timelines, and recognizing as an agency that internal management must be improved, a new paragraph has been added to clearly delineate how long the process should take.

For clarity, and because all these changes deal with how the appeal process will work, § § 217.9 and 217.10 have been combined. These sections are recoded § 217.8 and retitled Appeal process sequence. Section 217.11 is recoded § 217.9 Content of a notice of appeal. Proposed paragraph (b)(7) would have required appellants to state whether they had participated in predecisional activities. This paragraph has been dropped from the final rule because of the confusion it caused. Even though knowing whether or not an appellant has participated in predecisional matters is desirable, whether or not a participant was involved in predecisional matters was not intended to be a basis for dismissal. However, this was how the public interpreted the requirement.

To assist the public in understanding the timeframes and sequence of steps under the new rule, a flow chart of the process is set out at the end of this document as Appendix A; however it will not appear in the Code of Federal Regulations.

Section 217.12 Requests to delay implementation of a decision.

Proposed Part 217 did not permit delaying implementation of a Forest plan, but provided for an automatic delay of implementation of projects or activities scheduled during pendency of the review, upon request, so that a meaningful review on the merits would be preserved. The delay decisions were not subject to further discretionary review.

Comments: Most of the comments received concerned five major themes, characterized as follows: (1) All parties concerned should be notified of a delay request and the decision to grant or deny the request; (2) "urgent and compelling need" should be defined, preferably with examples; (3) requests to delay implementation should be granted automatically *except* under extraordinary circumstances; (4) requests to delay should be granted *only* under extraordinary circumstances; and, (5) there is a need for clear and comprehensive guidelines (standards) for granting a delay request. Many respondents pointed to a dual standard because in 36 CFR Part 251 the appellant has to justify the request for stay while under 36 CFR Part 217 the government is required to justify not granting a delay request.

Several respondents wanted the denial of a delay request to be appealable. Lastly, many respondents thought that the proposed provision which excludes delay of Forest plan implementation meant that subsequent projects would not be subject to delay, and that this was unacceptable. And, some respondents disagreed with quoted language from the preamble, "* * * there are not actions in a forest plan per se that would be immediately implementable and thus there are no actions to be stayed."

Response: In retrospect, the language should have stated, "* * * there are *seldom* any actions in a forest plan per se that would be * * * immediately implementable, and thus there are no actions to be stayed * * *". If a site specific project or activity is authorized in the forest plan, and which meets NEPA requirements, a delay should be considered if implementation would moot the review. Thus, the final language of the rule has been modified to make such projects or activities within a plan subject to delay if appellants so ask.

It has always been the practice of the agency to notify all parties concerned about stay decisions (referred to in the proposed rule as delay of implementation requests). This will not change with new rules.

The automatic stay device in the proposed rule was viewed as a way to preserve a meaningful review and simultaneously avoid forcing a requester to Court to obtain a restraining order. But in response to the dual standard concerns for granting stays voiced by respondents, the final rule provides that stay requests will not be automatically granted but will be considered and that stay requests must include specific reasons why the delay is needed. It is on this basis that the Reviewing Officer will either grant or deny a stay. Accordingly, the "urgent and compelling" standard is no longer necessary and has been deleted.

Additionally, the term "implementation" in proposed paragraph (a) has been changed to read "approval." It was the intent of this paragraph to preclude stays of plan approvals, but to consider staying activities undertaken to implement the plan, which as a consequence might moot a review if prematurely implemented. This change clarifies this intent.

For consistency with providing two levels of review on District Ranger decisions, the final rule provides for discretionary review of a Forest Supervisor's decision on a stay request. And, consistent with other language changes for clarity and understanding, the final rule has been modified to use the term "stay."

This section is recoded § 217.10 and retitled Stays.

217.13 Review file.

The proposal defined what consitutes the review file and specified how much time the Deciding Officer would have to assemble the relevant decision documents and pertinent records and transmit them to the Reviewing Officer. In contrast to the current rule, the Deciding Officer would not be required to prepare a Responsive Statement. Instead, the proposal allowed the Deciding Officer to respond briefly to issues raised in the request for review when transmitting the file to the Reviewing Officer.

Comments: Respondents voiced their concerns about the elimination of the Responsive Statement. The most frequent comments pertained to the value of the Responsive Statement and the reply thereto in "clarifying" the issues and in "justifying" the decision to proceed with an action. The Responsive Statement is seen by many as a way to foster dialogue about the rationale for the decision, the meaning of special terminology or technical matters, and the intent of the proposed activity. Many said that the current requirement to prepare a Responsive Statement helps ensure that the Deciding Officer understands an appellant's position.

Additionally, some respondents pointed out that the responsive statement had been eliminated in name only. Because the Deciding Officer would be allowed briefly to respond to issues in the transmittal letter, the letter would be, in fact, a Responsive Statement, and the appellant is given no opportunity to review or respond.

Response: Under the current rule, Responsive Statements are being used to carry the burden of discussion and justifying a project, plan, or activity. The intent of 36 CFR Part 217 is to focus on the environmental documentation and decision document completed as a consequence of the planning and decisionmaking process, and made available to those participating in the decisionmaking process, and to others prior to an appeal being filed. If the decision document does not "justify" the decision to proceed with an action, or explain the rationale for the decision, it is inadequate. A Responsive Statement is not necessary for a Reviewing Officer to make this determination. The purpose of eliminating the Responsive Statement is twofold: To expedite processing of an appeal and to ensure that NEPA-based decisions are adequately documented. The result should be better decision documents that reflect environmental disclosures and explain management action rationale. For these reasons, the final rule does not reinstate the requirement of a Responsive Statement. To prevent transmittal letters from becoming de facto Responsive Statements, the final rule deletes the provision allowing the Deciding Officer to respond to issues raised in the request for review, but retains the requirement that the Deciding Officer identify where in the documentation appellant's issues are addressed. The transmittal letter wil be made available to appellants and intervenors.

Other modifications to this section include giving Deciding Officers 30 days to transmit the record, instead of the proposed 21 days. This is because the rule has been modified to eliminate time extensions for this purpose, which under the current rule have nearly always been granted if requested. Lastly, taking into account other changes, the final rule states that the record closes either when the Deciding Officer forwards the record or when intervenors' comments are received, which ever is the latter.

This section is recoded and retitled § 217.15 Appeal record.

Section 217.14 Authority of reviewing officer in conduct of a review.

Part 217, as proposed, authorized the Reviewing Officer to establish whatever procedures are necessary to ensure orderly and expeditious conduct of a review. This section retained the provision of the current rule at 36 CFR 211.18 allowing a Reviewing Officer to consolidate reviews of the same decision or similar decisions involving common issues of fact or law. In keeping with the informal nature of the proposed review process, the Reviewing Officer has the authority to discuss issues related to the review with requesters, the Deciding Officer, or those who submit comments.

Comments: Part 217, as proposed, would permit free and open communication between parties with no requirement that these communications be documented or shared. Because of this, respondents raised the question of "*ex parte*" communications in which the Reviewing Officer is influenced by these discussions and the requester is not informed about them. Most respondents stated that the public had a right to know. The comments frequently used strong language to characterize this feature, such as unfair, undemocratic, prejudicial, secrecy, "back room deals," hiding information, etc. A few comments reflected a fear that internal documents would be immune to public review and that public participation would be discouraged.

One respondent suggested that, for purposes of issuing one decision, consolidation of appeals filed pursuant to Part 251 and reviews requested pursuant to Part 217 should be permitted, provided, of course, that both involve the same initial decision.

Response: This section has been modified to make it clear that any information sought by or otherwise utilized by the Reviewing Officer must be documented and shared among and between appellants and intervenors with opportunity afforded for comment. However, communications among or between the Deciding Officer, appellants, or intervenors do not have to be documented and made part of the record. Consolidation of review of appeals filed under Parts 217 and 251 which involve the same decision is not permitted, but the rules make clear that issuing only one decision may be appropriate.

In addition, as discussed under § 217.10, Reviewing Officers will be permitted to extend the time of the review period only to request, acquire, and evaluate information needed to clarify issues, or to hold meetings to resolve issues.

This section is recoded as § 217.13 and retitled, "Reviewing officer authority." Additionally, that portion dealing with discretionary review has been removed from this section and incorporated in § 217.17 Discretionary review.

217.15 Review decision.

The proposal established timelines for review decisions, 30 days for project decisions and 90 days for LRMP's, and stipulated that if no decision is made within 30 days once a decision is accepted for discretionary review, the lower level decision stands.

Comments: Several respondents felt it was unfair to allow the Forest Service twice the time to issue a decision on an appeal of a Forest plan decision (90 days) than is allowed for an appellant to read and review the plan, gather data, and prepare the request (45 days).

As discussed in § 217.8, many respondents found the idea of discretionary review unsatisfactory, voicing concerns that the timeframes would force a hurried review, because the 15-day period was insufficient to

exercise discretion, and the 30-day second level review period was too short. These respondents believed that the appellants would be punished by Forest Service procrastination or choosing to ignore the appeal, as the lower level decision would stand if timelines were not met.

Response: The 90-day timeframe for a Reviewing Officer to render a decision on an appeal of a Forest plan decision is retained in the final rule. As discussed under proposed § 217.9, the time available to prepare and file an appeal of a Forest plan has been modified. Thus, appellants of Forest plan decisions will have the same amount of time to prepare their appeal as the Reviewing Officer has to render a decision.

In response to comments that criteria are needed to guide a second level Reviewing Officer when deciding whether or not to review a lower level appeal decision, the final rule has been modified in § 217.16 to explain circumstances under which a Reviewing Officer might elect to exercise discretionary review of a lower decision. For example, a Reviewing Officer would consider such factors as controversy and litigation potential.

While the 15-day period provided for deciding whether to conduct a discretionary review of the lower level appeal or dismissal decision is unacceptable to some respondents, it is 5 days more than currently provided at the Chief's level. Thus, it is retained in the final rule. However, a provision has been added to the final rule stating that if the Reviewing Officer sends for the record at this point, the 15-day time period is suspended. The Deciding Officer has 5 days to send it forward. Upon receipt, the higher level Reviewing Officer will have 15 days to decide whether to conduct a discretionary review. It should be noted that the agency recognizes that it must improve its internal management of the process itself. This will require strengthening management controls, including those to be instituted by the Forest Service to assure that the discretionary review process works effectively and as it was intended. These will be issued as amendments to Forest Service Manual 1571 and Forest Service Handbook 1509.12 as direction to Forest Service personnel. Finally, the paragraph on discretionary review has been moved to a new section, § 217.17 Discretionary review.

The agency agrees with those respondents who expressed concern about appellants being punished by Forest Service procrastination. Therefore, the provision for automatically terminating the discretionary review after 30 days has been deleted and a statement releasing appellants from the administrative process has been added in the final rule. This section is recoded as § 217.16 and retitled "Decision."

217.16 Dismissal without review and decision.

The proposal specified the circumstances which would allow the dismissal of a review request without review.

Comments: Provision for dismissal without review was of considerable concern. Some respondents felt that the reasons for dismissal in the proposed rule were not clearly defined and that they would be interpreted subjectively, or used by the Forest Service to abuse the process. Several respondents suggested that the reasons for dismissal should be documented and that the decision to dismiss should be subject to discretionary review.

Response: The Forest Service agrees. As is the current practice, the agency will require a Reviewing Officer to document the reasons for dismissal in a decision letter. The omission of language to this effect in the proposed rule was an oversight. The final rule has been amended to direct the Reviewing Officer to provide written notice of a dismissal including an explanation of why the appeal is dismissed. And, on the basis of fairness and objectivity of review, the final rule has been modified to provide discretionary review of dismissal decisions. The final language cross-references new paragraph § 217.7(d) for clarification.

We believe the rule clearly defines the circumstances under which an appeal will be dismissed, and no modification is required.

This section is recoded § 217.11 and retitled "Dismissal without review."

Section 217.17 Resolution of issues during review.

The proposal made explicit the ability of the Deciding Officer to negotiate with those challenging a decision through the review process, and for Reviewing Officer to extend time for doing so. The proposed rule also provided that Deciding Officers could withdraw their initial decisions.

Comments: Some respondents were skeptical about and others opposed to the concept of seeking issue resolution after an appeal had been filed. They were concerned about compromising professional integrity and causing long delays in projects. Others were concerned that the Forest Service would use the resolution process to suspend action on an appeal, while allowing Forest plan direction to be implemented.

Most of the comments received supported the idea of a negotiated settlement, and offered additional suggestions. One respondent felt that the proposal would be strengthened by adding from 36 CFR Part 251 the mandatory "invitation to meet" language now required in decision letters to instrument holders. Several respondents were worried that the extension of deadlines would be abused, and unreasonable delays would occur. Suggestions included adding a definite time period to accomplish the negotiations; stipulating that the requester, Deciding Officer, Reviewing Officer, and other affected parties must agree to any extensions.

Additional concerns were expressed about communications during negotiations. Several respondents suggested that all affected parties be invited to participate in the negotiations. Because in the past some respondents had experienced a reluctance from the Forest Service to negotiate, several suggested that appellants, or even Reviewing Officers, should be able to request a negotiation session, not just the Deciding Officer.

Response: The Forest Service considered including the "invitation to meet" language from proposed 36 CFR Part 251 in proposed 36 CFR Part 217. However, it was not included because who might appeal is not known at the time a decision is recorded. Instead, the idea behind the "invitation to meet" proposed in 36 CFR Part 251 is embodied in this section and gives the Deciding Officer encouragement to meet with appellants and intervenors during the process to resolve issues. However, we agree that extensions of time to permit negotiations to occur should not be open ended. The final rule requires the Reviewing Officer to establish a reasonable duration. To require all parties to agree to any extensions is impractical, and in many cases an unlikely prospect. Some participants may be willing to work out solutions, and this prospect is more important than requiring all parties to agree to extensions. Therefore, this condition is not included in the final rule. The agency concurs with those respondents expressing concern about overcoming a reluctance to negotiate. There are some Forest Service officers who prefer a more structured appeals process rather than an informal negotiation process. Therefore, the final rule language is modified to allow Deciding Officers, Reviewing Officers, appellants, and intervenors to request meetings to

resolve issues. However, to preserve a Reviewing Officer's independence and objectivity should settlement not occur, the final rule provides that even though the Reviewing Officer may request that a meeting be held, Reviewing Officers may not participate in negotiations with appellants and/or intervenors, a limitation which overcomes problems associated with *ex parte* communications.

This section is recoded § 217.12, and retitled "Resolution of issues."

Section 217.18 Policy in event of judicial proceedings.

This section in the proposed rule created no new policy; it merely articulated longstanding practice consistent with judicial precedent favoring completion of the administrative process prior to court involvement.

Comments: The comments on this issue were few but emphatic. Respondents criticized the proposed language in other parts of the rule that would limit the kind of information included in the record or available to parties to the appeal, i.e., undocumented conversations or other information not shared with parties to the appeal. Absent an equitable procedure for sharing information, an inadequate administrative record is the result. Therefore, exhaustion of the administrative procedures in 36 CFR Part 217 should not be required of appellants as a prerequisite to direct access to court, because a court would not limit itself to an inadequate administrative record. Respondents also expressed concern that the Forest Service could frustrate appellants' access to court by delaying decisionmaking through manipulating extensions of time.

Response: As discussed in § 217.14, the final rule has been modified to make it clear that it is the information sought by the Reviewing Officer that must be documented and shared with all participants with opportunity for comment provided. The Forest Service believes that this clarification in the final rule resolves the concern. Therefore, this section is retained. However, it has been modified to permit the Chief to waive the policy on a case-by-case basis.

General Comment on Proposed Rule 36 CFR Part 251

Much less comment was received about this rule than the proposal for 36 CFR Part 217. However, the comment generally centered around the same major concerns expressed about 36 CFR Part 217, and most of it appeared to be from individuals and organizations who would not be eligible to utilize this rule.

The following summarizes the major comments and suggestions received on the proposed revision of 36 CFR Part 251, Subpart C, and the Department's response to these comments. Many respondents felt that the proposed rule was hard to follow. Thus, the final rule has been rearranged to more closely follow the steps in the process, and the headings have been retitled to better describe their contents. However, comments are keyed to the section numbers and headings of the proposed rule document.

Section 251.80 Purpose and scope.

The proposed rule asserted that it established a fair and deliberate process for appealing and reviewing written decisions arising from the issuance, approval, and administration of written instruments that authorize the occupancy and use of National Forest System land.

Comments: Those commenting on this section focused on the unfairness of two rules. They said it was inconsistent with the tenets of due process as well as unworkable. They also voiced concerns because it does not provide for an impartial judge. Others were concerned because they already feel they are in a weak bargaining position with the Forest Service and that this rule will make it worse.

Response: The agency disagrees that this rule is inconsistent with the tenets of due process. In fact, this rule is a structured, grievance-oriented rule that provides the elements of due process that are fundamental to resolving issues that arise from a business or legal relationship between the Forest Service and an appellant. It is quite similar in this respect to the current rule, 36 CFR 211.18. As pointed out in the discussion of Options Considered in the proposed rule document, the agency considered an independent board or impartial judge. However, this idea was rejected because such a formalized process may intensify adversarial relationships with the agency. Such a relationship is counter to the Forest Service commitment and desire to increase communication and cooperation with the public. In addition, the independent board or judge approach to appeal administration would tend to erode the agency's statutory authority to administer its programs and to supervise, correct, or redirect its operations. Therefore, the final rule remains an internal administrative appeal procedure.

The final rule retains this section, as proposed.

Section 251.81 Applicability and effective date.

This section would allow for the continuance of appeals related to written instruments that have already been brought under the current rule: 36 CFR 211.18, 36 CFR 228.14, or 36 CFR 292.15. No comments were received. The final rule retains this section as proposed; however, it is recoded as § 251.102.

Section 251.82 Definitions and terminology.

This section defines the terms used in this subpart. No comments were received. The final rule retains this section as proposed, however, it is recoded as § 251.81.

Section 251.83 Parties eligible to participate.

The rule proposed three types of parties eligible to participate: (1) Appellants—that is a holder of a written instrument or authorization or an applicant who is applying for an authorization in response to a solicitation by the Forest Service; (2) intervenors—other applicants for the same authorization, or holders of similar authorizations who have a direct interest that could be directly impacted by the appeal decision; and (3) the Deciding Officer.

Comments: There were many comments voiced about eligibility. Some respondents said it was too narrow as to who was eligible because it didn't apply to all applicants, and that it prevents adjacent landowners from appealing issuance of permits for activities which would have a negative environmental impact on their lands. Some respondents believed that States should have an opportunity to appeal or intervene. Others suggested allowing groups to intervene who supported either the permittee or appellant or those who would be affected by the appeal decision.

Response: The limitations on who can appeal and intervene are essential to this rule, because it is designed only to resolve issues arising from a decision to issue or approve, to deny issuance or approval, or to administer an existing authorization. These persons have a business or legal relationship with the Forest Service by virtue of the application for or the holding of a written instrument, and because of that relationship must have a procedure for bringing and resolving grievances.

Those who object to the use of the lands or resources to be covered by the issuance of an authorization can request review of the basic decision under 36

CFR Part 217 if this basic decision involves documentation required by agency planning and environmental analysis procedures. In addition, the initial allocation decision made through Forest level planning is reviewable under 36 CFR Part 217.

Therefore, this section has been retained in its entirety and is recoded § 251.86 and retitled Parties.

Section 251.84 Appealable decisions.

This section of the proposed rule lists the written decisions arising from specific types of permitted uses of National Forest System lands that can be appealed. The decisions vary from approval of grazing of livestock to approvals of special use permits. The approval of plans of mining operations pursuant to 36 CFR Part 228 and 36 CFR 292.17 and 292.18 would be added to the list of appealable decisions, ending previous separate processes. It also gives instructions for how notice of decisions appealable under this rule will be given.

Comments: Comments on this section generally dealt with specific questions on different types of decisions and whether or not they were appealable under this rule. For instance, Memorandums of Understanding (MOU), purchases of forest lands under 16 U.S.C. 521c–521i; decisions not to proceed with exchanges and disapproval of surface use plans. Other comments included questions about which rule would govern if a permit action triggered a NEPA review, and why notices of decision were sent only to applicants or holders and not to other National Forest users. One respondent suggested making the list of instruments non-inclusive so that future ones could be included.

Response: If the decision on a MOU is recorded through NEPA procedures, the decision is appealable under the procedures outlined in 36 CFR Part 217. However, later action under the MOU would be appealable by the holder of a permit under 36 CFR Part 251.

Section 251.86 of the proposed rule speaks to those situations where a decision could be appealed under both rules. An appellant eligible to appeal under either rule must choose which review process will be used and forfeits all right to use the other process.

Decisions covered under 16 U.S.C. 521c–521i usually entail NEPA compliance and, therefore, would be appealable under 36 CFR Part 217. We agree that decisions not to proceed with an exchange or disapproval of a surface use plan should also be listed. We also agree with the suggestion that the list be non-inclusive. The final rule language has been revised to include both of these items.

Because the matter under appeal is between the Forest Service and the holder of a permit or an applicant for a permit, extensive public notice requirements are not necessary unless the action involved NEPA, in which case the notice requirements of 36 CFR Part 217 must be met. A new section is added to the final rule, § 251.84 Obtaining notice, and the language about notice in proposed § 251.84 has been incorporated in this new section. The final rule clarifies that prompt notice is required. Also, this section is recoded § 251.82.

Section 251.85 Decisions not appealable under this subpart.

This section excludes from appeal the same decisions that are currently excluded under 36 CFR 211.18. In addition, it updates the list to reflect the enforcement of Uniform Rules for Protection of Archaeological Resources at 36 CFR Part 296, orders related to 36 CFR Part 261, decisions related to rehabilitation of National Forest System lands resulting from natural catastrophes if a Regional Forester or the Chief gives notice in the **Federal Register**, and decisions covered by 36 CFR Part 217.

Comments: Comments on this section generally addressed the exclusion of decisions related to rehabilitation for National Forest System lands resulting from natural catastrophes. Some respondents expressed the opinion that it is unnecessary to list these as exclusions since the Regional Forester or Chief would exclude them via **Federal Register** notice. Other respondents said the rule (§ 251.85(k)) was unclear concerning which NEPA decisions were appealable and which were excluded.

Response: The agency expects most decisions resulting from natural catastrophes will not be excluded except under extraordinary circumstances. In any event, a decision to exclude does not excuse the Regional Forester or Chief from NEPA compliance on the rehabilitation decision. A holder of a written instrument or an applicant could appeal under 36 CFR Part 251 or 36 CFR Part 217 depending on how the decision affects them. Therefore, it is appropriate to have the rehabilitation exclusion proviso in this section, and the final rule retains it.

Paragraph (k) refers to intermediate decisions. This exclusion continues current practice. Only the final decision, as documented in a Record of Decision, Decision Notice, or Decision Memo is appealable under 36 CFR Part 217, except as provided for at 36 CFR 251.86. The final rule retains this exclusion.

This section is recoded as § 251.83, and retitled Decisions not appealable.

Section 251.86 Election of appropriate review procedure.

This section covers those instances when a decision might be appealable under this rule as well as reviewable under Part 217. It requires the appellant to choose the appropriate review process, and further advises that an appellant thereby forfeits all right to use the other process for that decision.

Comments: Respondents on this section questioned the likelihood of the same decision being appealable and reviewable under both rules. They voiced the opinion that it just complicates the process and doubted its usefulness. Others suggested permitting participation under 36 CFR Part 217 even if an appellant has elected appeal under 36 CFR Part 251.

Response: It is possible that a decision could be made that is both appealable under this rule and reviewable under 36 CFR Part 217, but it should be a fairly rare circumstance. Therefore, this procedure is necessary. The choice of formal or informal review should be the applicant's or instrument holder's choice to make, not the Forest Service's choice. However, the final rule now includes a provision for appellants under this rule to participate in a review being conducted under 36 CFR 217.6(b).

The final rule retains this section but recodes it as § 251.85, retitled "Election of appeal process."

Section 251.87 Levels of review available.

The proposed rule change offers one level of appeal but makes the second level of review at the discretion of that officer.

Comments: Many respondents objected to the concept of a one-level appeal process in this rule for the same reasons outlined in the section discussing the public comment received on 36 CFR Part 217. Therefore, the discussion is not repeated here.

Response: Similarly, and consistent with the final rule at 36 CFR Part 217, the final rule provides for a two-level appeal process for decisions made at the District Ranger level. However, second level appeal of a Ranger Decision by the Regional Forester will not be automatic. The appellant will have to request it; the review will be based solely on the existing record without any additional submissions; and, the second level decision will not receive further review.

Also consistent with the changes at 36 CFR Part 217, dismissal decisions will be subject to discretionary review. A

new paragraph (d) was added in the final rule to clarify this change.

The provisions detailing how discretionary review will work has been moved to a new section, § 251.100 Discretionary review, bringing into one place all references to discretionary review. In the proposed rule, these references were found in §§ 251.87, 251.89, 251.94, 251.97, 251.98, and 251.99. The comments on discretionary review are further responded to under § 251.99 Appeal decision.

Section 251.88 Filing procedures and timeliness.

The procedures of this section are different from the current rule in two notable ways. One, under the proposed rule, an appellant would file an appeal with the Reviewing Officer instead of the Deciding Officer. Second, the filing period which would end 45 days from the date of the written decision, is not extendable, and timeliness decisions are not subject to appeal.

Comments: Comments received on this section questioned the appeal period beginning on the date the decision is signed. They felt it should begin after the appellant receives the decision. They went on to say that the agency should use Certified Mail to establish this date and to establish timely filing by the appellant. Other respondents questioned whether it was the postmark or receipt at the designated office that established timely filing.

Some respondents perceived that the filing period had been shortened and asserted that the possibility for time extensions must be included along with extending the 20-day period appellants have to reply to the Responsive Statement.

Response: The only date the Forest Service can control is the date of the decision. It would be extremely confusing for everyone concerned to have differing dates should there be multiple appeals. Furthermore, the proposed language follows current practice. Using Certified Mail to establish the date does not guarantee the party will receive it in a timely manner, and, therefore, the appeal period might never begin for that party. Current practice by the Forest Service is to send appeal related correspondence via certified mail within a day of the decision. The proposed rule does not preclude Forest officers from continuing this practice. The agency cannot require appellants to use certified mail. As in current practice, timely filing will be ascertained by the postmarked date if the documents are mailed, or delivery date if others means are used.

The proposed rule language provided for the same length of time to file a first level appeal as the current appeal rule.

The discussion that follows on § 251.89 addresses the concerns voiced on time extensions.

This section is retitled "Filing procedures." A flow chart of the process will be set out at the end of this document as Appendix B, but it will not appear in the Code of Federal Regulations.

Section 251.89 Extension of time.

This section would give a Reviewing Officer the discretion to extend all time lines expressed in the rule except the time to file a notice of appeal and for discretionary reviews of appeal decisions.

Comments: The only comment received on this section urged that instead of granting time extensions, both parties be placed on a rigid time table. It was suggested that if the appellant fails to meet any of the time lines, the Forest Service decision should stand; and if the Forest Service fails to meet any of the time lines, the appellant should prevail and the decision be changed to reflect the relief requested in the appellant's notice of appeal.

Response: The agency believes there are instances involving written instrument authorizations when extenuating cirumstances prevail and extending the time lines is necessary and appropriate. Therefore, the final rule retains the language from the proposal. It is retitled "Time extensions."

Section 251.90 Notice of appeal content.

The proposed rule made clear that the appellant bears the burden of proof in their notice of appeal as to why a decision should be changed. It included a detailed list of information to be provided by the appellant.

Comments: Those commenting on this section focused on three areas of concern. First, the fact that the Statement of Reasons must accompany the Notice of Appeal and the time provided was insufficient to prepare all this information; second, that there is no provision for correcting deficiencies; and last, there is no provision for notifying Deciding Officers about receipt of an appeal so their preparation of the Responsive Statement can begin.

Response: The agency believes that the time provided is adequate. Most matters involving written instrument will be relatively straight forward and will not require additional time. The rules, as proposed, did not prohibit correcting deficiencies or augmenting initial submissions with additional submissions. As is the current practice, however, if additional information is submitted for the record, it must be shared with all parties in a timely manner that will allow them time for comment prior to the record closing.

The proposed rule did require simultaneous filing of an appeal with the Deciding Officer in § 251.89. This triggers the Deciding Officer's preparation of the Responsive Statement.

The final rule retains the proposed language; however, it is retitled "Content of notice of appeal."

Section 251.91 Responsive statement.

The proposed rule retains the features of the current rule with regard to responsive statements. A Deciding Officer must prepare the Responsive Statement within 30 days and send to the appellant a statement responding to the facts, or issues of law or regulation alleged by an appellant. A copy must also be sent to any intervenors. All parties have 20 days to reply to the Responsive Statement.

Comments: Those comments addressing this section were concerned with two areas. First, that only permittees received a copy of the responsive statement and not the public. Second, that the 20-day time period to comment on the responsive statement is tied to the postmarked date of the responsive statement rather than the day it is received.

Response: It is fundamental to this rule that parties to the appeal be apprised of information submitted to the record and provided an opportunity to reply to the information. Because the public is not a party to the appeal, they are not entitled to receive a copy of the responsive statement. This is consistent with the current rule.

The only date the Forest Service can control is the date it is mailed. It is not practicable to use the receipt date. Therefore, the final rule retains the proposed language. However, it is recoded and retitled, § 251.94 Responsive statement.

Section 251.92 Implementation and request for stay of implementation.

The proposed rule allowed implementation of a decision under appeal unless a stay is requested and granted. This section incorporates most of the content requirements of the existing rule for requesting a stay.

Comments: There were two differing opinions expressed on this section. Some respondents felt that it should be deleted altogether because most stay

requests are frivolous and used as a delay tactic. The other respondents voiced the opinion that stays should be granted automatically.

Response: Decisions appealable under this rule involve holders and certain applicants who enjoy a business or legal relationship with the Forest Service. This provision is needed to ensure that the appeal is not mooted by implementation of the decision prior to review of the disputed decision. The agency does not believe that most stay requests filed pursuant to the current rule are frivolous. By their very nature, a stay is a delaying mechanism. However, as noted above, it is a necessary one.

The final rule retains the language as proposed but combines this section with §§ 251.93 and 251.94. The combined sections are recoded and retitled as § 251.91 Stays.

Section 251.93 Ruling on stay requests.

This section, as proposed, permits the Reviewing Officer to deny a stay if the decision appealed is not scheduled to take effect during pendency of the appeal. The section also requires the Reviewing Officer to rule on stay requests within 10 calendar days from receipt, and also lists the criteria a Reviewing Officer shall consider in ruling on stay requests. And, as is the current practice, the proposed rule required the Reviewing Officer to issue a written decision and specified the content of the decision letter, depending on the decision.

Comments: The only comment on this section voiced concern that the language in paragraph (b) could expose the Forest Service to charges of being arbitrary. Without elaborating, the contention appears to be based on respondent's view that § 251.93(b) gives blanket authority for denial, while § 251.92 requires appellants to justify a stay request.

Response: The agency has reviewed the proposed language and does not agree that paragraph (b) could be considered arbitrary. It is a signal to appellants to utilize the stay procedures judiciously and not to clog the process with meaningless requests. As discussed in the preamble to the proposed rule, the purpose of a stay is to delay implementation of a decision under appeal if harmful effects to the appellant could occur during pendency of the appeal. It makes no sense to process paperwork for decisions that will not take effect until after the appeal decision is rendered. Thus, the final rule modifies the provision for denial of a stay where implementation is not imminent to say that the Reviewing Officer will not accept such requests. And, for consistency with providing two levels of review on District Ranger decisions, the final rule provides for discretionary review of a Forest Supervisor's decision on a stay request.

The final rule combines this section with §§ 251.92 and 251.94. The combined section is retitled "Stays" and coded as § 251.91.

Section 251.94 Duration of and changes to stay decisions.

The proposed language establishes that stays will remain in effect during the 15-day period for determining discretionary review. Further, a Reviewing Officer may change a stay decision at any time that circumstances support a change. Petitions to change will also be accepted. Stay decisions or changes thereto are not appealable. No comments on this section were received. The final rule retains the language as proposed but incorporates it in § 251.91 Stays.

Section 251.95 Intervention.

Under the proposed rule, intervention would be limited to applicants for or holders of a written instrument of the same or a similar type that is the subject of or affected by the appeal, and have an interest that could be directly affected by an appeal decision. Intervenors would not be able to continue an appeal if the appellant withdraws the appeal.

Comments: Two areas of concern were surfaced from those commenting on this section. Many respondents believed that the proposal was too limiting as to who could intervene. Some believed that anyone with an immediate interest or affected by the decision should be allowed to intervene. Other respondents said the proposal prevented organizations from intervening on behalf of holders.

The other area of concern was continuance of an appeal. Respondents believed that they have the right to continue an appeal even if the appellant withdraws.

Response: The proposed rule is limited, by virtue of a written instrument, to those persons who have a business or legal relationship with the Forest Service that is established by the instrument. It is, therefore, appropriate and necessary to limit the basis for intervention in an appeal under the proposed rule to parties who have a similar relationship that could be affected by the disputed decision. In many instances, the decision to grant or to deny a particular use of lands or resources under a written instrument may be preceded by environmental analysis and documented pursuant to agency planning and decision making procedures (36 CFR Part 219 and 40 CFR Parts 1500 through 1508 and associated implementing regulations). Consequently, the general public has opportunity at this point to appeal under 36 CFR Part 217.

Since an intervenor would not be a party to an appeal unless an appellant had appealed, it is only logical that there is no further standing for an intervenor to carry on an appeal mooted by withdrawal. Intervenors are defined as those having an interest that could be directly affected by the decision on the appeal. If there is no appeal decision because the appeal is withdrawn, there is no effect on the intervenor.

Therefore, the final rule retains the language proposed. The section is recoded § 251.96.

Section 251.96 Oral presentations.

The proposed rule established the purpose of the oral presentation and that they can be held either in person or by phone. A request for an oral presentation that accompanies a notice of appeal would be granted automatically; requests received later would also be considered but the decision to grant the request would be discretionary. Decisions on oral presentation requests would not be appealable.

Appellant and intervenors must bear any expense in attending an oral presentation. And, the presentation may be open to public attendance, but to participation, at the Reviewing Officer's discretion.

Comments: Respondents on this section voiced a concern that parties must bear any expense of participation. Some suggested that the oral presentation should take place as close to the site involved as possible while others suggested making oral presentations discretionary.

Respondents also found unacceptable the option for public attendance at the oral presentation.

Response: While the agency is sympathetic, the Government cannot assume costs for either conference calls or transportation associated with an oral presentation, except on its own behalf. Neither is the Forest Service required to arrange an oral presentation at a location or in a manner that is disadvantageous to the Government. Moreover, the proposal is consistent with current practice.

Practice under the current rule usually limits attendance to the parties involved in the appeal; however, members of the general public sometimes request, and receive, permission to attend at the

discretion of the Reviewing Officer. The proposal incorporated this policy. Because the appeal process is an open process, this provision is retained in the final rule. The remainder of this section is also retained without change in the final rule; however, the section is recoded § 251.97.

Section 251.97 Authority of reviewing officer in conduct of appeal.

This section would authorize the Reviewing Officer to establish whatever procedures are necessary to ensure an orderly, expeditious, and fair conduct of an appeal. Such procedural matters would not be subject to appeal and further review. The proposal retains the current provision allowing a Reviewing Office to consolidate appeals. The proposed rule also makes clear that the Reviewing Officer may ask for additional information from any party to an appeal, but all parties must be notified of the request and receive copies of any information supplied. This section stipulates that an appeal of a Chief's initial decision conducted by the Secretary would be subject to the same rules and procedures applicable to all other first level appeals. This section also addresses procedures applicable to conduct of discretionary reviews.

Comments: Respondents commented on two segments of this section: consolidation, and acquiring additional information. Most respondents commenting on consolidation were concerned with having no recourse to opposing consolidation. One respondent suggested that this section provide for consolidation of appeals/reviews proceeding simultaneously under Parts 251 and 217. Others suggested that appellants should also be able to request consolidation.

Some respondents suggested that any additional information sought by the Reviewing Officer should be limited to information existing at the time of the initial decision. Other respondents commented that if adequate documentation did not exist for the original decision when it was made, the decision should be canceled rather than seeking additional information. Some respondents also expressed confusion about requirements for sharing acquired information.

Response: As is the practice currently, appellants may register their opposition to consolidation. Experience shows consolidation of multiple appeals of the same or similar decision is a useful procedure to simplify paperwork. And, the proposed language follows a longstanding practice currently permitted by the present rule. Appellants are seldom in a position to know when consolidation is appropriate. However, incorporating the results of a separate review of the same decision under Part 217 and an appeal under Part 251 into one decision is a good idea. As discussed in the corresponding section of Part 217, the final rule has been modified to permit this at the discretion of the Reviewing Officer.

The provision for acquiring additional information does not imply that the Reviewing Officer could seek information that was not available to the Deciding Officer when the decision was made. The final rule clarifies that additional information sought by the Reviewing Officer is solely for clarifying issues.

This section is recoded as § 251.95 and retitled "Authority of Reviewing Officer." Additionally, the portions discussing discretionary review have been incorporated into a new section devoted exclusively to discretionary review at § 251.100.

Section 251.98 Appeal record.

This section defines what constitutes the appeal record at both the first level and discretionary level of review. Additionally, this section prohibits reopening the record at the discretionary level except when the Secretary reviews an initial decision of the Chief.

Comments: The respondents to this section questioned whether the record would be available and all actions documented.

Response: The proposed rule language makes clear that the appeal record is open to the public throughout the appeal. Further, it details what the record should contain.

The final rule retains the language as proposed. However, the paragraph discussing discretionary review is moved to the new separate § 251.100.

Section 251.99 Appeal decision.

The proposed rule provided information to the Reviewing Officer on the nature of the decision to be rendered and continued the 30-day timeframe from closure of the record for rendering a decision on the appeal. This section also set a 30-day period for rendering a decision if discretionary review is exercised.

Comments: Respondents to this section expressed concern about discretionary review. Some respondents believe that it gives the reviewer an easy way out and is not responsive to public concerns. Further, some respondents objected to decisions being made on whether or not to exercise discretionary review without explanation being provided to parties.

Some respondents suggested that an extension clause be added to extend the 30-day discretionary review period by 15 days on a priority basis. Other respondents suggested that appellants be given an opportunity to waive the discretionary review.

There were also some respondents who objected to decisions on the merits being made without being given an answer. A few respondents objected to the Forest Service being able to grant itself additional time to render the decision.

Response: The agency would not expect a Reviewing Officer to escape review by letting time expire. As discussed in Part 217, while the 15-day period provided for deciding whether to conduct a discretionary review of the lower level appeal or dismissal decision is unacceptable to some respondents, it is 5 days more than currently provided at the Chief's level. Thus, it is retained in the final rule. However, a provision has been added to the final rule stating that if the Reviewing Officer sends for the record at this point, the 15-day time period is suspended. The Deciding Officer has 5 days to send it forward. Upon receipt, the higher level Reviewing Officer will have 15 days to decide whether to conduct a discretionary review. It should be noted that the agency recognizes that it must improve its internal management of the process itself. This will require strengthening management controls, including those to be instituted by the Forest Service to assure that the discretionary review process works effectively and as it was intended. These will be issued as amendments to Forest Service Manual 1571 and Forest Service Handbook 1509.12 as direction to Forest Service personnel. While the suggestion for waiver of the discretionary review by the appellant has merit, it increases the paperwork involved. Requesting waiver is not prohibited, so appellants have this option should they wish to use it. If, under the current rule the Secretary chooses not to exercise discretionary review, no explanation of this decision is required or given. The final rule continues this practice, but appellants will be notified. This paragraph of this section has been moved and incorporated in the new section devoted to discretionary review.

Consistent with changes in Part 217, the provision for automatically terminating the discretionary review after 30 days has been deleted and a statement releasing appellants from the administrative process has been added in the final rule. The final rule also includes general criteria for the

Reviewing Officer to consider when contemplating discretionary review. For example, controversy surrounding the decision and potential for litigation.

The agency noted that the proposed rule is confusing about what constitutes "issuing" an appeal decision. Therefore, the final rule clarifies this point and stipulates that it will be mailed.

As explained under § 251.89, the agency believes there are instances involving written instrument authorizations when time extensions are necessary. For example, when a permittee must assemble records that are not readily available. Moreover, the provision for requesting a time extension does apply to both the agency and the appellant. Therefore, the final rule retains this provision.

The remaining sections on dismissal (§ 251.100), resolution of issues (§ 251.101), and judicial proceedings (§ 251.102), did not receive specific comments. However, for consistency with the final rule at 36 CFR 217.11, and in response to comment on the proposal at 36 CFR 217.16, the provision on dismissal is modified to provide that dismissal decisions are subject to discretionary review at the next higher administrative level, is cross-referenced to new paragraph § 251.87(d), and is recoded § 251.92 in the final rule. Resolution of issues is recoded at § 251.93, and Policy in event of judicial proceedings is recoded at § 251.101 and modified similar to § 217.17 to permit the exhaustion policy to be waived by the Chief.

Full attention has been given to the comments received in preparing these final regulations. Therefore, the agency is adopting as a final rule, 36 CFR Part 251, Subpart C and 36 CFR Part 217, with the changes discussed in this preamble and with the necessary conforming amendments to Parts 211 and 228 which are adopted without change from the proposed rule. In addition, the final rule contains a conforming amendment to the rules in Part 292, Subpart C, to make clear that appeals of decisions related to the standards for use, subdivision, and development of privately owned property within the boundaries of the Sawtooth National Recreation Area are subject to the final rules at 36 CFR Part 251.

Regulatory Impact

This proposed rule has been reviewed under USDA procedures and Executive Order 12291 on Federal Regulations. It has been determined that this is not a major rule. The rule will not have an effect of $100 million or more on the economy, substantially increase prices or costs for consumers, industry, or State or local governments, nor adversely affect competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete in foreign markets.

Moreover, this proposed rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and it has been determined that this action will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

Based on both experience and environmental analysis, this final rule would not have a significant effect on the human environment, individually or cumulatively. Therefore, it is categorically excluded from documentation in an environmental assessment or an environmental impact statement (40 CFR 1508.4).

Controlling Paperwork Burdens on the Public

This rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR Part 1320 and therefore imposes no paperwork burden on the public.

Lists of Subjects

36 CFR Part 211

Administrative practice and procedure, National forests.

36 CFR Part 228

Environmental protection, Mines, National forests, Public lands—mineral resources, Public lands—rights-of-way, Reporting and recordkeeping requirements, Surety bonds, Wilderness.

36 CFR Part 251

Administrative practice and procedure, Electric power, National forests, Public lands—right-of-way, Reporting and recordkeeping requirements, Water resources.

36 CFR Part 292

Recreation and recreation uses.

Therefore, for the reasons set forth above, Title 36 of the Code of Federal Regulations is amended as follows:

PART 211—ADMINISTRATION [AMENDED]

1. The authority citation for Part 211 would continue to read as follows:

Authority: 30 Stat. 35, as amended, sec. 1, 33 Stat. 628 (16 U.S.C. 551, 472).

Subpart B—Appeal of Decisions Concerning the National Forest System [Amended]

2. Add a new paragraph (o) to § 211.16 to read as follows:

§ 211.16 Appeal of resource recovery and rehabilitation decisions resulting from natural catastrophes.

* * * * *

(o) *Applicability and effective date.* The procedures of this section shall not apply to any appeal received after February 22, 1989.

3. Amend paragraph (s) of § 211.18 by adding a sentence to the end of the paragraph as follows:

§ 211.18 Appeal of decisions of forest officers.

* * * * *

(s) * * * The procedures of this section shall not apply to any request to appeal filed after February 22, 1989.

4. Add a new Part 217 to read as follows:

PART 217—REQUESTING REVIEW OF NATIONAL FOREST PLANS AND PROJECT DECISIONS

Sec.

Authority: 16 U.S.C. 551, 472.

§ 217.1 Purpose and scope.

(a) This subpart provides a process by which a person or organization interested in the management of the National Forest System may obtain review of an intended action by a higher level official. These rules establish who may appeal planned actions, the kind of decisions that may be appealed, the responsibilities of the participants in an appeal, and the procedures that apply.

(b) The process established in this part constitutes the final administrative opportunity for the public to influence National Forest System decisionmaking prior to implementation of various

decisions. The rules of this subpart complement, but do not replace, numerous opportunities to participate in and influence agency decisionmaking provided pursuant to the National Environmental Policy Act of 1969 (NEPA), and the associated implementing regulations and procedures in 40 CFR Parts 1500 through 1508, 36 CFR Parts 216 and 219, Forest Service Manual Chapters 1920 and 1950, and Forest Service Handbooks 1909.12 and 1909.15. The rules do not provide an adjudication, grievance-oriented process. Rather, they provide an expeditious, objective review of NEPA derived decisions by an official at the next administrative level.

§ 217.2 Definitions.

For the purposes of this part—

"Appellant" is the term used to refer to a person or organization (or an authorized agent or representative acting on their behalf) filing a notice of appeal under this part.

"Deciding Officer" means the Forest Service line officer who has the delegated authority and responsibility to make the decision being questioned under these rules.

"Decision document" means a written document that a Deciding Officer signs to execute a decision subject to review under this part. Specifically a Record of Decision, a Decision Notice, or Decision Memo.

"Decision documentation" refers to the decision document and all relevant environmental and other analysis documentation on which the Deciding Officer based a decision that is at issue under the rules of this part. Decision documentation includes, but is not limited to, a project file for proposed actions categorically excluded from documentation in an environmental assessment or environmental impact statement, environmental assessments, findings of no significant impact, environmental impact statements, land and resource management plans, regional guides, documents incorporated by reference in any of the preceding documents, and drafts of these documents released for public review and comment.

"Decision Memo" is a concise memorandum to the files signed by a Deciding Officer recording a decision to take or implement an action that has been categorically excluded from documentation in either an environmental assessment or environmental impact statement (40 CFR 1508.4).

"Decision Notice" means the written document signed by a Deciding Officer when the decision ws preceded by preparation of an environmental assessment (40 CFR 1508.9).

"Decision review" or "review" is the term used to refer to the process provided in this part by which a higher level officer reviews a decision of a subordinate officer in response to a notice of appeal.

"Forest Service line officer". The Chief of the Forest Service or a Forest Service official who serves in a direct line of command from the Chief and who has the delegated authority to make and execute decisions under this subpart. Specifically, for the purposes of this subpart, a Forest Service employee who holds one of the following offices and titles: District Ranger, Forest Supervisor, Deputy Forest Supervisor, Regional Forester, Deputy Regional Forester, Deputy Chief, Associate Deputy Chief, Associate Chief, or the Chief of the Forest Service.

"Intervenor" is an individual who, or organization that, is interested in or potentially affected by a decision under appeal pursuant to this part, who has made a timely request to intervene in that appeal.

"Notice of appeal" is the written document filed with a Reviewing Officer by one who objects to a decision covered by this part and who requests review by the next higher line officer.

"Participants" include appellants, intervenors, the Deciding Officer, and the Reviewing Officer.

"Record of Decision" is the document signed by a Deciding Officer recording a decision that was preceded by preparation of an environmental impact statement (40 CFR 1505.2).

"Reviewing Officer" is the line officer one administrative level higher than the Deciding Officer or, in the case of a discretionary review, one level higher than the line officer who issued a first-level appeal decision.

§ 217.3 Decisions subject to appeal.

(a) Except as provided in § 217.4 of this part, written decisions governing plans, projects, and activities to be carried out on the National Forest System that result from analysis, documentation, and other requirements of the National Environmental Policy Act and the National Forest Management Act, and the implementing regulations, policies, and procedures are subject to appeal under this part.

(1) Only decisions documented in a Decision Memo, Decision Notice, or a Record of Decision are subject to appeal under this part. Preliminary planning decisions or preliminary decisions as to National Environmental Policy Act or National Forest Management Act processes made prior to release of final plans, guides, and other environmental documents are not appealable until issuance of decision documents.

(2) Forestry research and State and private forestry programs and activity decisions are subject to appeal under this part, if a specific decision is documented pursuant to paragraph (a)(1) of this section, and would be carried out directly on National Forest System lands.

(b) Decisions subject to appeal under this part include, but are not limited to:

(1) Approval, amendment, and revision of a forest land and resource management plan prepared pursuant to 36 CFR Part 219.

(2) Approval, and amendment of a regional guide for forest planning prepared pursuant to 36 CFR 219.8.

(3) Other projects and activities for which decision documents are prepared, such as timber sales, road and facility construction, range management and improvements, wildlife and fisheries habitat improvement measures, forest pest management activities, removal of certain minerals or mineral materials, land exchanges and acquisitions, and establishment or expansion of winter sports or other special recreation sites.

(c) Decisions on any of the matters listed in this section made by an authorized subordinate Forest Service staff officer acting within delegated authority are considered to be decisions of the Forest Service line officer to whom the subordinate employee reports.

§ 217.4 Decisions not subject to appeal.

(a) The following decisions are not subject to appeal under this part:

(1) Decisions appealable to the Agriculture Board of Contract Appeals, U.S. Department of Agriculture, under 7 CFR Part 24.

(2) Decisions involving Freeedom of Information Act denials under 7 CFR Part 1 or Privacy Act determinations under 7 CFR 1.118.

(3) Decisions for which the jurisdiction of another Government agency or the Comptroller General supercedes that of the Department of Agriculture.

(4) Recommendations of Forest Service line officers to higher ranking Forest Service or Departmental officers or to other entities having final authority to implement the recommendation in question.

(5) Decisions appealable under separate administrative proceedings, including, but not limited to, those under 36 CFR 223.117, Administration of Cooperative or Federal Sustained Yield Units; 7 CFR 21.104, Eligibility for

Relocation Payment or Amount; and 4 CFR Part 21, Bid Protests.

(6) Decisions pursuant to Office of Management and Budget Circular A–76, Performance of Commercial Activities.

(7) Decisions concerning contracts under the Federal Property and Administration Services Act of 1949, as amended.

(8) Decisions covered by the Contract Disputes Act.

(9) Decisions involving Agency personnel matters.

(10) Decisions where relief sought is reformation of a contract or award of monetary damages.

(11) Decisions related to rehabilitation of National Forest System lands and recovery of forest resources resulting from natural disasters or other natural phenomena such as wildfires, severe wind, earthquakes, and flooding when the Regional Forester or, in situations of national significance, the Chief of the Forest Service determines and gives notice in the **Federal Register** that good cause exists to exempt such decisions from review under this part.

(12) Decisions embodied in rulemaking promulgated in accordance with the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or in policies and procedures issued in the Forest Service Manual and handbooks (36 CFR Parts 200 and 216).

(13) Decisions imposing penalties for archaeological violations under 36 CFR 296.15 or to issue order or violations of prohibitions and orders under 36 CFR Part 261.

(14) Decisions solely affecting the business relationship between the Forest Service and applicants for or holders of written instruments regarding occupancy and use of National Forest System lands except as provided for at 36 CFR 251.82.

(b) In addition to decisions excluded from appeal by paragraph (a) of this section, the Forest Service shall not accept any notice of appeal on subsequent implementing actions that result from the initial decision subject to review under this part as defined at § 217.3(b)(3). For example, an initial decision to offer a timber sale is appealable under this part; subsequent actions to advertise or award that sale are not appealable under this part. A subsequent implementing decision that is documented in a new decision document would be subject to appeal under this part.

§ 217.5 Giving notice of decisions subject to appeal.

(a) For decisions subject to appeal under this part, Deciding Officers shall promptly mail the appropriate decision document (§ 217.3(a)(1)) to those who, in writing, have requested it, and to those who are known to have participated in the decisionmaking process.

(b) In addition to the notice required by paragraph (a) of this section, the Deciding Officer shall promptly publish a notice in the **Federal Register** about decisions that are considered to have effects of national concern, including those types of decisions of national concern made by the Chief that are subject to review under this part.

(c) Responsible officials may provide other forms of notice, including legal notice in newspapers of general circulation, as provided for in 40 CFR 1506.6, Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act.

§ 217.6 Participants.

(a) Other than Forest Service employees, any person or any non-Federal organization or entity may challenge a decision covered by this part and request a review by the Forest Service line officer at the next administrative level.

(b) An intervenor as defined in § 217.2 of the subpart.

§ 217.7 Levels of appeal.

(a) *Decisions made by the Chief.* If the Chief of the Forest Service is the Deciding Officer, the notice of appeal is filed with the Secretary of Agriculture. Review by the Secretary is wholly discretionary. Within 15 days of receipt of a notice of appeal, the Secretary shall determine whether or not to review the decision in question. If the Secretary has not decided to review the Chief's decision by the expiration of the 15-day period, the requester(s) shall be notified that the Chief's decision is the final administrative decision of the Department of Agriculture. Procedures governing such reviews are set forth at § 217.17 of this part.

(b) *Decisions made by Forest Supervisors and Regional Foresters.* Only one level of administrative review is available on written decisions by Forest Service line officers below the level of the Chief and above the level of the District Ranger. The levels of available review are as follows:

(1) If the decision is made by a Forest Supervisor, the notice of appeal is filed with the Regional Forester;

(2) If the decision is made by a Regional Forester, the notice of appeal is filed with the Chief of the Forest Service.

(c) *Decisions made by the District Ranger.* Two levels of appeal are available for written decisions by the District Ranger.

(1) The initial appeal is filed with the Forest Supervisor.

(2) The notice of appeal for a second level of review must be filed with the Regional Forester within 15 days of the Forest Supervisor's appeal decision. Upon receiving the appeal, the Regional Forester shall promptly request the first level appeal record from the Forest Supervisor. The review shall be conducted on the existing file and no additional information shall be added to the file.

(d) *Discretionary review of dismissal decisions.* Dismissal decisions rendered by Forest Service line officers pursuant to this part (§ 217.11) are subject to discretionary review (§ 217.17) by the officer at the next higher level. The levels of discretionary review are as follows:

(1) If the Reviewing Officer was the Forest Supervisor, the Regional Forester has discretion to review.

(2) If the Reviewing Officer was the Regional Forester, the Chief has discretion to review.

(3) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review.

(e) *Discretionary review of appeal decisions.* Appeal decisions rendered by Regional Foresters and the Chief pursuant to this part are subject to discretionary review (§ 217.17) by the officer at the next higher level. The levels of discretionary review are as follows:

(1) If the Reviewing Officer was the Regional Forester, the Chief has discretion to review, except as provided for in paragraph (e)(3) of this section.

(2) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review.

(3) A Regional Forester's decision on a second-level appeal constitutes the final administrative determination of the Department of Agriculture on the appeal and is not subject to discretionary review by a higher level officer under the subpart.

§ 217.8 Appeal process sequence.

(a) *Filing procedures.* To appeal a decision under this part, a person or organization must:

(1) File a written notice of appeal in accordance with the provisions of § 217.9 of this part with the next higher line officer.

(2) Simultaneously send a copy of the notice of appeal to the Deciding Officer.

(3) File the notice of appeal within 45 days of the date of the decision for project decisions documented in a Decision Memo, Decision Notice, or Record of Decision (§ 217.3).

(4) File the notice of appeal within 90 days of the date of the decision for land and resource management plan approvals, significant amendments, or revisions, and for other programmatic decision documented in a Record of Decision.

(b) *Computation of time periods.* (1) The day after the decision date is the first day of the time period for filing. All other time periods applicable to this part are tied to the filing of a notice of appeal and begin on the first day following that filing.

(2) All time periods in this rule are to be computed using calendar days. Saturdays, Sundays, and Federal holidays are included in computing the time period for filing a notice of appeal; however, when the filing period would expire on a Saturday, Sunday, or Federal holiday, the filing time is extended to the end of the next Federal working day.

(c) *Evidence of timely filing.* It is the responsibility of the appellant to file the notice on or before the last day of the filing period. In the event of question, a legible postmark will be considered evidence of timely filing. Where postmarks are illegible, the Reviewing Officer shall rule on the timely filing of the appeal. As provided for in § 217.11, notices of appeal that are late shall be dismissed.

(d) *Time extensions.* (1) The 45-day/90-day filing periods for a notice of appeal are not extendable.

(2) Time extensions are not permitted except as provided in §§ 217.12, 217.13, and 217.17 of this subpart.

(e) *Appeal decision.* Unless time has been extended as provided for in §§ 217.12 and 217.13, the Reviewing Officer shall not exceed the following time periods for rendering an appeal decision:

(1) An appeal of a project decision, not more than 100 days from the date the notice of appeal was filed.

(2) An appeal of a land and resource management plan approval, significant amendment, or revision, or on a programmatic decision documented in a Record of Decision, not more than 160 days from the date the notice of appeal was filed.

(3) A second-level appeal of a District Ranger's decision, not more than 30 days from the date the first-level appeal record was received.

(4) In the event of multiple appeals of the same decision, the appeal decision date shall be calculated from the filing date of the last notice of appeal.

§ 217.9 Content of a notice of appeal.

(a) It is the responsibility of those who appeal a decision under this part to provide a Reviewing Officer sufficient narrative evidence and argument to show why the decision by the lower level officer should be changed or reversed.

(b) At a minimum, a written notice of appeal filed with the Reviewing Officer must:

(1) List the name, address, and telephone number of the appellant;

(2) Identify the decision about which the requester objects;

(3) Identify the document in which the decision is contained by title and subject, date of the decision, and name and title of the Deciding Officer.

(4) Identify specifically that portion of the decision or decision document to which the requester objects;

(5) State the reasons for objecting, including issues of fact, law, regulation, or policy, and, if applicable, specifically how the decision violates law, regulation, or policy; and

(6) Identify the specific change(s) in the decision that the appellant seeks.

§ 217.10 Stays.

(a) Requests to stay the approval of land and resource management plans prepared pursuant to 36 CFR Part 219 shall not be granted. However, requests to stay implementation of a project or activity included in such a plan will be considered as provided for in paragraph (b) of this section.

(b) Where a project or activity would be implemented before an appeal decision could be issued, the Reviewing Officer shall consider written requests to stay implementation of that decision pending completion of the review.

(c) To request a stay of implementation, an appellant must—

(1) File a written request with the Reviewing Officer;

(2) Simultaneously send a copy of the stay request to any other appellant(s), intervenor(s), and to the Deciding Officer; and

(3) Provide a written justification of the need for a stay, which at a minimum includes the following:

(i) A description of the specific project(s), activity(ies), or action(s) to be stopped.

(ii) Specific reasons why the stay should be granted in sufficient detail to permit the Reviewing Officer to evaluate and rule upon the stay request, including at a minimum:

(A) The specific adverse effect(s) upon the requester;

(B) Harmful site-specific impacts or effects on resources in the area affected by the activity(ies) to be stopped; and

(C) How the cited effects and impacts would prevent a meaningful decision on the merits.

(d) The Reviewing Officer shall rule on stay requests within 10 days of receipt of a request.

(e) In deciding a stay request, a Reviewing Officer shall consider:

(1) Information provided by the requester pursuant to paragraph (c) of this section;

(2) The effect that granting a stay would have on preserving a meaningful appeal on the merits;

(3) Any information provided by the Deciding Officer or other party to the appeal in response to the stay request; and

(4) Any other factors the Reviewing Officer considers relevant to the decision.

(f) A Reviewing Officer must issue a written decision on a stay request.

(1) If a stay is granted, the stay shall specify the specific activities to be stopped, duration of the stay, and reasons for granting the stay.

(2) If a stay is denied in whole or in part, the decision shall specify the reasons for the denial.

(3) A copy of a decision on a stay request shall be sent to the appellant(s), intervenor(s), and the Deciding Officer.

(g) A decision may be implemented during a review unless the Reviewing Officer has granted a stay.

(h) A Reviewing Officer's decision on a request to stay implementation of a project or activity is not subject to discretionary review at the next administrative level, except when the Reviewing Officer is the Forest Supervisor. In this instance, the Regional Forester has discretion to review.

§ 217.11 Dismissal without review.

(a) A Reviewing Officer shall dismiss an appeal and close the appeal record without decision on the merits when:

(1) The notice is not filed within the time specified in § 217.8 of this part;

(2) The requested relief or change cannot be granted under law, fact, or regulation existing when the decision was made.

(3) The notice of appeal fails to meet the minimum requirements of § 217.9 of this part to such an extent that the Reviewing Officer lacks adequate information on which to base a decision;

(4) The decision at issue is being appealed under another administrative proceeding;

(5) The decision is excluded from appeal pursuant to § 217.4 of this part;

(6) The appellant(s) withdraws the appeal; or

(7) The Deciding Officer withdraws the appealed decision.

(b) The Reviewing Officer shall give written notice of a dismissal to all

participants that includes an explanation of why the appeal is dismissed.

(c) A Reviewing Officer's dismissal decision is subject to discretionary review at the next administrative level as provided for in § 217.7(d) of this part.

§ 217.12 Resolution of issues.

(a) When a decision is appealed, the Deciding Officer may discuss the appeal with the appellant(s) and intervenor(s) together or separately to narrow issues, agree on facts, and explore opportunities to resolve the issues by means other than review and decision on the appeal. Reviewing Officers may, on their own initiative, request the Deciding Officer to meet the participants to discuss the appeal and explore opportunities to resolve the issues. However, Reviewing Officers may not participate in such discussions. Reviewing Officers may at the request of the Deciding Officer's, or on their own initiative, extend the time periods for review and specify a reasonable duration to allow for conduct of meaningful negotiations.

(b) The Deciding Officer has the authority to withdraw a decision, in whole or in part, during the appeal. Where a Deciding Officer decides to withdraw a decision, all participants to the appeal will be notified that the case is dismissed. A Deciding Officer's subsequent decision to reissue or modify the withdrawn decision constitutes a new decision and is subject to appeal under this part.

§ 217.13 Reviewing officer authority.

(a) *Discretion to establish procedures.* A Reviewing Officer may issue such determinations and procedural instructions as appropriate to ensure orderly and expeditious conduct of the appeal process as long as they are in accordance with all the applicable rules and procedures of this part.

(1) In appeals involving intervenors, the Reviewing Officer may prescribe special procedures to conduct the appeal.

(2) In case of multiple appeals of a decision, the Reviewing Officer may prescribe special procedures as necessary to conduct the review.

(3) All participants shall receive notice of any procedural instructions or decisions governing conduct of an appeal.

(4) Procedural instructions and decisions are not subject to review by higher level officers.

(b) *Consolidation of multiple appeals.* (1) The Reviewing Officer shall determine whether to issue one appeal decision or separate decisions in cases involving multiple notices of appeal under this part, or if the same decision is also under appeal pursuant to 36 CFR Part 251. In the event of a consolidated decision, the Reviewing Officer shall give advance notice to all who have appealed the decision.

(2) Decisions to consolidate an appeal decision are not subject to review by higher level officers.

(c) *Requests for information.* At any time during the appeal process, the Reviewing Officer at the levels specified in § 217.7 (a) and (b) of this part may extend the time periods for review to request additional information from an appellant, intervenor, or the Deciding Officer. Such requests shall be limited to obtaining and evaluating information needed to clarify issues raised. The Reviewing Officer shall notify all participants of such requests and provide them opportunity to comment on the information obtained.

(d) *Conduct of review of decisions made by the Chief.* When the Secretary elects to review an initial decision made by the Chief (§ 217.7(a)), the Secretary shall conduct the review in accordance with all the applicable rules and procedures of this part.

§ 217.14 Intervention.

(a) For a period not to exceed 20 days following the filing of a first level notice of appeal, the Reviewing Officer shall accept requests to intervene in the appeal from any interested or potentially affected person or organization. Requests to intervene in an appeal at the second level (§ 217.7(c)) or during the discretionary review (§ 217.7(e)) shall not be accepted.

(b) Upon receiving such a request, the Reviewing Officer shall promptly acknowledge the request, in writing, and mail the Notice of Appeal to the intervenor.

(c) The Reviewing Officer shall accept into the appeal record written comments about the appeal from an intervenor for a period not to exceed 30 days following acknowledgement of the intervention request (§ 217.14(b)).

(d) Intervenors must concurrently furnish copies of all submissions to the appellant. Failure to provide copies may result in removal of a submission from the appeal record.

(e) An intervenor cannot continue an appeal if the appeal is dismissed (§ 217.11).

§ 217.15 Appeal record.

(a) Upon receipt of a copy of the notice of appeal, the Deciding Officer shall assemble the relevant decision documentation (§ 217.2) and pertinent records, and transmit them to the Reviewing Officer within 30 days.

(b) In transmitting the decision documentation to the Reviewing Officer, the Deciding Officer shall indicate where the documentation addresses the issues raised in the notice of appeal. The Deciding Officer shall provide a copy of the transmittal letter to the appellant(s) and intervenor(s).

(c) The review of decisions appealed under this part focuses on the documentation developed by the Deciding Officer in reaching decisions. The records on which the Reviewing Officer shall conduct the review consists of the notice of appeal, any written comments submitted by intervenors, the official documentation prepared by the Deciding Officer in the decisionmaking process, the Deciding Officer's letter transmitting those documents to the Reviewing Officer, and any appeal related correspondence, including additional information requested by the Reviewing Officer pursuant to § 217.13 of this part.

(d) It is the responsibility of the Reviewing Officer to maintain in one location a file of documents related to the decision and appeal.

(e) *Closing the record.* (1) In appeals involving intervenors, the appeal record shall close upon receipt of comments on the appeal by the intervenor or at the end of the 30-day period for providing comments, whichever is the latter date, unless time has been extended as provided for in §§ 217.12 and 217.13.

(2) In appeals without intervenors, the appeal record shall close upon receipt of the decision documentation from the Deciding Officer, unless time has been extended as provided for in §§ 217.12 and 217.13.

(f) The appeal record is open to public inspection at any time during the review.

§ 217.16 Decision.

(a) The Reviewing Officer shall not issue a decision prior to the record closing (§ 217.15(e)).

(b) The Reviewing Officer's decision shall, in whole or in part, affirm or reverse the original decision. The Reviewing Officer's decision may include instructions for further action by the Deciding Officer.

(c) An appeal decision must be consistent with applicable law, regulations, and orders.

(d) The Reviewing Officer shall send a copy of the decision to all participants and to others upon request.

(e) Unless a higher level officer exercises the discretion to review a Reviewing Officer's decision as

provided at § 217.7(e), or the Reviewing Officer is a Forest Supervisor, the Reviewing Officer's decision is the final administrative decision of the Department of Agriculture and that decision is not subject to further review under this part.

§ 217.17 Discretionary review.

(a) Petitions or requests for discretionary review shall not, in and of themselves, give rise to a decision to exercise discretionary review. In electing to exercise discretion, a Reviewing Officer should consider, but is not limited to, such factors as controversy surrounding the decision, the potential for litigation, whether the decision is precedential in nature, or whether the decision modifies existing or establishes new policy.

(b) Within one day following the date of a Forest Supervisor's stay decision (§ 217.10(f)), a dismissal decision (§ 217.11) or an appeal decision (§ 217.16) rendered by a Reviewing Officer, that officer shall forward a copy of the appeal decision and the decision documents (§ 217.2) upon which the appeal is predicated to the next higher officer.

(c) When a stay of implementation is in effect, it shall remain in effect until the end of the 15-day period in which a higher level officer must decide whether or not to review a Reviewing Officer's decision (§ 217.17(d)), or until the end of the 15-day period provided for a second level appeal of a District Ranger's decision (§ 217.7(c)). If the higher level officer decides to review the Reviewing Officer's decision or a second level appeal is filed, the stay will remain in effect until a decision is issued (§ 217.17(f)), or until the end of the 30-day review period provided in §217.17(g), whichever is less.

(d) The higher level officer shall have 15 days from date of receipt to decide whether or not to review a lower level appeal decision, and may request and use the appeal record in deciding whether or not to review the decision, including decisions to dismiss. If the record is requested, the 15-day period is suspended at that point. The lower level Reviewing Officer shall forward it within 5 days of the request. Upon receipt, the higher level officer shall have 15 days to decide whether or not to review the lower level decision. If that officer takes no action by the expiration of the 15-day period or the additional 5-day period following receipt of the record, the decision of the Reviewing Officer stands as the final administrative decision of the Department of Agriculture. All participants shall be notified by the discretionary level whether or not the decision will be reviewed.

(e) Where an official exercises the discretion in § 217.7 (d) or (e) of this subpart to review a dismissal or appeal decision, the discretionary review shall be made on the existing appeal record and the lower level Reviewing Officer's appeal decision. The record shall not be reopened to accept additional submissions from any party to the appeal or from the Reviewing Officer who appeal decision is being reviewed.

(f) The second level Reviewing Officer shall conclude the review within 30 days of the date of notice issued to participants that the lower level decision will be reviewed, and shall send a copy of the review decision to all participants.

(g) If a discretionary review decision is not issued by the end of the 30-day review period, appellants and intervenors shall be deemed to have exhausted their administrative remedies for purposes of judicial review. In such case, the participants shall be notified by the discretionary level.

§ 217.18 Policy in event of judicial proceedings.

It is the position of the Department of Agriculture that any filing for Federal judicial review of a decision subject to review under this part is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the procedures available under this part. This position may be waived upon a written finding by the Chief.

§ 217.19 Applicability and effective date.

(a) The appeal procedures established in this part apply to all notices of appeal filed after February 22, 1989.

(b) Notices of appeal filed under 36 CFR 211.16, 36 CFR 211.18, 36 CFR 228.14, and 36 CFR 292.15 prior to February 22, 1989 remain subject to those procedures.

PART 228—MINERALS [AMENDED]

5. The authority citation for Part 228 continues to read as follows:

Authority: 30 Stat. 35 and 36, as amended (16 U.S.C. 55), and 94 Stat. 2400.

Subpart A—Locatable Minerals [Amended]

6. Revise § 228.14 to read as follows:

§ 228.14 Appeals

Any operator aggrieved by a decision of the authorized officer in connection with the regulations in this part may file an appeal under the provisions of 36 CFR Part 251, Subpart C.

PART 251—LAND USES [AMENDED]

7. Add a new Subpart C to read as follows:

Subpart C—Appeal of Decisions Relating to Occupancy and Use of National Forest System Lands

Sec.

Subpart C—Appeal of Decisions Relating to Occupancy and Use of National Forest System Land

Authority: 16 U.S.C. 472,551.

§ 251.80 Purpose and scope.

(a) This subpart provides a process by which those who hold or, in certain instances, those who apply for written authorizations to occupy and use National Forest System lands, may appeal a written decision by an authorized Forest Service line officer with regard to issuance, approval, or administration of the written instrument. The rules in the subpart establish who may appeal under these rules, the kinds of decisions that can and cannot be appealed, the responsibilities of parties to the appeal, and the various procedures and timeframes that will govern the conduct of appeals under this subpart.

(b) The rules in this subpart seek to offer appellants a fair and deliberate process for appealing and obtaining administrative review of decisions regarding written instruments that authorize the occupancy and use of National Forest System lands.

§ 251.81 Definitions and terminology.

For the purposes of this subpart, the following terms are defined:

Appeal. A request to a higher ranking officer for relief from a written decision filed under this subpart by an applicant

for or a holder of a written instrument issued or approved by a Forest Service line officer.

Appeal decision. The written decision rendered by the Reviewing Officer on an appeal for relief under this subpart. The use of this term is limited to the final decision of a Reviewing Officer and does not refer to a stay decision or to any other determinations or procedural orders made on the conduct of an appeal (§ 251.99).

Appeal record. The documents submitted to the Reviewing Officer by an appellant, intervenor, or Deciding Officer (§ 251.98).

Appellant. An eligible applicant for or holder of a written instrument issued for the occupancy and use of National Forest System land (or their authorized agent or representative) who files an appeal pursuant to the provisions of this subpart (§ 251.86).

Deciding officer. The Forest Service line officer who makes a decision related to issuance, approval, or administration of an authorization to occupany and use National Forest System lands that is appealed under this subpart.

Decisions regarding a written instrument or authorization to occupy and use National Forest System lands. A broad, all inclusive phrase used throughout this subpart to connote the full range of actions and decisions a forest officer takes to issue written instruments, or to manage authorized uses of National Forest System lands, including, but not limited to, enforcement of terms and conditions, and suspension, cancellation, and/or termination of an authorization.

Forest System line officer. The Chief of the Forest Service or a Forest Service official who serves in a direct line of command from the Chief and who has the delegated authority to make and execute decisions under this subpart. Specifically, for the purposes of this subpart, a Forest Service employee who holds one of the following offices and titles: District Ranger, Forest Supervisor, Deputy Forest Supervisor, Regional Forester, Deputy Regional Forester, Deputy Chief, Associate Deputy Chief, Associate Chief, or the Chief of the Forest Service.

Intervenor. An individual who, or organization that, is an applicant for or holder of the written instrument, or a similar instrument, issued by the Forest Service that is the subject of an appeal, and who has an interest that could be affected by an appeal, and who has made a timely request to intervene in that appeal, and who has been granted intervenor status by the Reviewing Officer (§ 251.96).

Issuance of a written instrument of authorization. Applies both to decisions to grant and to deny a written instrument or authorization.

Notice of appeal. The document prepared and filed by an appellant to dispute a decision subject to review under this subpart (§ 251.90).

Oral presentation. An informal meeting (in person or by telephone) at which an appellant, intervenor, and/or Deciding Officer may present information related to an appeal to the Reviewing Officer (§ 251.97).

Parties to an appeal. The appellant(s), intervenor(s), and the Deciding Officer.

Responsive statement. A written document prepared by a Deciding Officer that responds to the notice of appeal record by an appellant (§ 251.94).

Reviewing Officer. The officer at the next administrative level above that of the Deciding Officer who conducts appeal proceedings, makes all necessary rulings regarding conduct of an appeal, and issues the appeal decision.

Written instrument or authorization. Any of those kinds of documents listed in § 251.82 of this subpart issued or approved by the Forest Service authorizing an individual, organization or other entity to occupy and use National Forest System lands and resources.

§ 251.82 Appealable decisions.

(a) The rules of this subpart govern appeal of written decisions of Forest Service line officers related to issuance, denial, or administration of the following written instruments to occupy and use National Forest System lands, including but not limited to:

(1) Permits for ingress and egress to intermingled and adjacent private lands across National Forest System lands, 36 CFR 212.8 and 212.10.

(2) Permits and occupancy agreements on National Grasslands and other lands administered under the provisions of Title III of Bankhead-Jones Farm Tenant Act issued under 36 CFR 213.3.

(3) Grazing and livestock use permits issued under 36 CFR Part 222, Subpart A.

(4) Mining plans of operating under 36 CFR Part 228, Subpart A.

(5) Mining operating plans for the Sawtooth National Recreation Area issued under 36 CFR 292.17 and 292.18.

(6) Permits and agreements regarding mineral materials (petrified wood and common varieties of sand, gravel, stone, pumice, pumicite, cinder, clay and other similar materials) under 36 CFR 228, Subpart C.

(7) Permits authorizing exercise of mineral rights reserved in conveyance to the United States issued under 36 CFR Part 251, Subpart A.

(8) Special use authorizations issued under 36 CFR Part 251, Subpart B, except, as provided in § 251.60(g), for suspension or termination of easements issued pursuant to 36 CFR 251.53(e) and (e)(1).

(9) Land exchange agreements under 36 CFR 254.11 and decisions to proceed/not proceed with land exchanges.

(10) Permits for uses in Wilderness Areas issued under 36 CFR 293.3.

(11) Permits to excavate and/or remove archaeological resources issued under the Archaeological Resources Protection Act 1979 and 36 CFR Part 296.

(12) Approval/non-approval of Surface Use Plans of Operations related to the authorized use and occupancy of a particular site or area.

(13) Decisions to object, or not to object to the issuance of minerals leases.

(14) Decisions related to the standards for the use, subdivision, and development of privately owned property within the boundaries of the Sawtooth National Recreation Area pursuant to 36 CFR Part 292, Subpart C.

(b) Written decisions on any of the matters of the type listed in paragraph (a) of this section issued by a Forest Service staff officer with delegated authority to act for a Forest Service line officer are considered to be decisions of the line officer.

§ 251.83 Decisions not appealable.

The following decisions are not appealable under this subpart:

(a) Decisions appealable to the Agriculture Board of Contract Appeals, USDA, under 7 CFR Part 24.

(b) Decisions involving Freedom of Information Act denials under 7 CFR Part 1 or Privacy Act determinations under 7 CFR 1.118.

(c) Decisions for which the jurisdiction of another Government agency, the Comptroller General, or a court to hear and settle disputes supersedes that of the Department of Agriculture.

(d) Recommendations of Forest Service line officers to higher ranking Forest Service line officers or to other entities having final authority to implement the recommendation in question.

(e) Decisions appealable under separate administrative proceedings, including, but not limited to, those under 36 CFR 223.117 (Administration of Cooperative for Federal Sustained Yield Units); 7 CFR 21.104 (Eligibility for Recreation Payment of Amount); and 4 CFR Part 21 (Bid Protests).

(f) Decisions pursuant to Office of Management and Budget Circular A–76, Performance of Commercial Activities.

(g) Decisions concerning contracts under the Federal Property and Administrative Services Act of 1949, as amended.

(h) Decisions covered by the Contract Disputes Act.

(i) Decisions involving Agency personnel matters.

(j) Decisions where relief sought is reformation of a contract or award of monetary damages.

(k) Decisions made during the preliminary planning process pursuant to 36 CFR Part 219 and 40 CFR Parts 1500–1508 that precede decisions to implement the proposed action.

(l) Decisions related to National Forest land and resource management plans and projects only reviewable under 36 CFR Part 217.

(m) Decisions related to rehabilitation of National Forest System lands and recovery of forest resources resulting from natural disasters or other natural phenomena such as wildfires, severe wind, earthquakes, and flooding when the Regional Forester or, in situations of national significance, the Chief of the Forest Service determines and gives notice that good cause exists to exempt such decisions from appeal under this subpart.

(n) Decisions imposing penalties for archaeological violations under 36 CFR 296.15 or for violations of prohibitions and orders under 36 CFR Part 261.

(o) Reaffirmation of prior decisions to terminate a special use authorization.

§ 251.84 Obtaining notice.

A Deciding Officer shall promptly give written notice of decisions subject to appeal under this subpart to applicants and holders defined in § 251.86 of this subpart and to any holder of like instruments who has made a written request to be notified of a specific decision. The notice shall include a statement of the Deciding Officer's willingness to meet with applicants or holders to hear and discuss any concerns or issues related to the decision (§ 251.93). The notice shall also specify the name of the officer to whom an appeal of the decision may be filed, the address, and the deadline for filing an appeal.

§ 251.85 Election of appeal process.

(a) No decision can be appealed by the same person under both this subpart and Part 217 of this chapter.

(b) Should a decision be reviewable under this subpart as well as Part 217 of this chapter, a party who qualifies to bring an appeal under this subpart can elect which process to use for obtaining review of a decision, but in so doing, the appellant thereby forfeits all right to appeal the same decision under the other review process. However, a holder who waives the right to appeal under the provisions of 36 CFR Part 217 may intervene pursuant to 36 CFR 217.6(b).

§ 251.86 Parties.

Only the following may participate in the appeals process provided under this subpart:

(a) An applicant who, in response to a prospectus or written solicitation or other notice by the Forest Service, files a formal written request for a written authorization to occupy and use National Forest System land covered under § 251.82 of this subpart and

(1) Was denied the authorization, or

(2) Was offered an authorization subject to terms and conditions that the applicant finds unreasonable or impracticable.

(b) The signatory(ies) or holder(s) of a written authorization to occupy and use National Forest System land covered under § 251.82 of this subpart who seeks relief from a written decision related to that authorization.

(c) An intervenor as defined in § 251.81 of this subpart.

(d) The Deciding Officer who made the decision being appealed under this subpart.

§ 251.87 Levels of appeal.

(a) *Decisions made by the Chief.* If the Chief of the Forest Service is the Deciding Officer, the appeal is to the Secretary of Agriculture. Review by the Secretary is discretionary. Within 15 calendar days of receipt of a timely notice of appeal, the Secretary shall determine whether or not to review the decision. If the Secretary has not decided whether or not to review the decision by the expiration of the 15-day period, the appellant shall be notified that the Chief's decision is the final administrative decision of the Department of Agriculture. Procedures governing such reviews are set forth at § 251.100 of this part.

(b) *Decisions made By Forest Supervisors and Regional Foresters.* Only one level of appeal is available on written decisions by Forest Service line officers below the level of the Chief and above the level of the District Ranger. The levels of available appeal are as follows:

(1) If the decision is made by a Forest Supervisor, the appeal is filed with the Regional Forester;

(2) If the decision is made by a Regional Forester, the appeal is filed with the Chief of the Forest Service.

(c) *Decisions made by the District Ranger.* Two levels of appeal are available for written decisions by District Rangers.

(1) The appeal for initial review is filed with the Forest Supervisor.

(2) The appeal for a second level of review is filed with the Regional Forester within 15 days of the first level appeal decision. Upon receiving such a request, the Regional Forester shall promptly request the first level file from the Forest Supervisor. The review shall be conducted on the existing record and no additional information shall be added to the file.

(d) *Discretionary review of dismissal decisions.* Dismissal decisions rendered by Forest Service line officers pursuant to this part (§ 251.92) are subject only to discretionary review by the officer at the next higher level. The levels of discretionary review are as follows:

(1) If the Reviewing Officer was the Forest Supervisor, the Regional Forester has discretion to review.

(2) If the Reviewing Officer was the Regional Forester, the Chief has discretion to review.

(3) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review.

(e) *Discretionary review of appeal decisions.* Appeal decisions rendered by Regional Foresters and the Chief pursuant to this part are subject to discretionary review by the officer at the next higher level. The levels of discretionary review are as follows:

(1) If the Reviewing Officer is the Regional Forester, the Chief of the Forest Service has discretion to review.

(2) If the Reviewing Officer is Chief, the Secretary of Agriculture has discretion to review.

(3) A Regional Forester's decision on a second-level appeal constitutes the final administrative determination of the Department of Agriculture on the appeal and is not subject to further review by a higher level officer under this subpart.

§ 251.88 Filing procedures.

(a) *Filing procedures.* In order to appeal a decision under this subpart, an appellant must:

(1) File a notice of appeal in accordance with § 251.90 of this subpart with the next higher line officer as identified in § 251.87.

(2) File the notice of appeal within 45 days of the date on the notice of the written decision being appealed (§ 251.84); and

(3) Simultaneously send a copy of the notice of appeal to the Deciding Officer.

(b) *Evidence of timely filing.* It is the responsibility of those filing an appeal

to file the notice of appeal by the end of the filing period. In the event of questions, legible postmarks will be considered evidence of timely filing. Where postmarks are illegible, the Reviewing Officer shall rule on the timeliness of the notice of appeal. Untimely submissions are subject to dismissal as provided for in § 251.92(2).

(c) *Computation of time period for filing.* (1) The time period for filing a notice of appeal of a decision under this subpart begins on the first day after the Deciding Officer's written notice of the decision. All other time periods applicable to this subpart also will be computed to begin on the first day following an event or action related to the appeal.

(2) Time periods applicable to this subpart are computed using calendar days. Saturdays, Sundays, or Federal holidays are included in computing the time allowed for filing an appeal; however, when the filing period would expire on a Saturday, Sunday, or Federal holiday the filing time is extended to the end of the next Federal working day.

§ 251.89 Time extensions.

(a) *Filing of notice of appeal.* Time for filing a notice of appeal is not extendable.

(b) *All other time periods.* Appellants, Intervenors, Deciding Officers, and Reviewing Officers shall meet the time periods specified in the rules of this subpart, unless a Reviewing Officer has extended the time as provided in this paragraph. Except as noted in paragraph (a) of this section, the Reviewing Officer may extend all other time periods under this subpart.

(1) For appeals of initial written decisions by the Chief, a Regional Forester, or a Forest Supervisor, a Reviewing Officer, where good cause exists, may grant a written request for extension of time to file a responsive statement or replies thereto. The Reviewing Officer shall rule on requests for extensions within 10 days of receipt of the request and shall provide written notice of the extension ruling to all parties to the appeal.

(2) Except for discretionary reviews of appeal decisions as provided in § 251.87(d) of this subpart, a Reviewing Officer may extend the time period for issuance of the appeal decision, including for purposes of allowing additional time for the Deciding Officer to resolve disputed issues, as provided in § 251.93 of this subpart.

§ 251.90 Content of notice of appeal.

(a) It is the responsibility of an appellant to provide a Reviewing Officer sufficient narrative evidence and argument to show why a decision by a lower level officer should be reserved or changed.

(b) An appellant must include the following information in a notice of appeal:

(1) The appellant's name, mailing address, and daytime telephone number;

(2) The title or type of written instrument involved, the date of application for or issuance of the written instrument, and the name of the responsible Forest Service Officer;

(3) A brief description and the date of the written decision being appealed;

(4) A statement of how the appellant is adversely affected by the decision being appealed;

(5) A statement of the facts of the dispute and the issue(s) raised by the appeal;

(6) Specific reference to any law, regulation, or policy that the appellant believes to be violated and that the appellant believes to be violated and the reason for such an allegation;

(7) A statement as to whether and how the appellant has tried to resolve the issue(s) being appealed with the Deciding Officer, the date of any discussion, and the outcome of that meeting or contact; and

(8) A statement of the relief the appellant seeks.

(c) An appellant may also include in the notice of appeal a request for oral presentation (§ 251.97) or a request for stay of implementation of the decision pending on the appeal (§ 251.93).

§ 251.91 Stays.

(a) A decision may be implemented during an appeal unless the Reviewing Officer grants a stay.

(b) An appellant or intervenor may request a stay of a decision at any time while an appeal is pending, if the harmful effects alleged pursuant to paragraph (c)(3) of this section would occur during pendency of the appeal. The Reviewing Officer shall not accept any request to stay implementation of a decision that is not scheduled to begin during pendency of the appeal.

(c) To request a stay of decision, an appellant or intervenor must—

(1) File a written request with the Reviewing Officer;

(2) Simultaneously send a copy of the stay request to any other appellant(s), to intervenor(s), and to the Deciding Officer.

(3) Provide a written justification of the need for a stay, which at a minimum includes the following:

(i) A description of the specific project(s), activity(ies), or action(s) to be stopped.

(ii) Specific reasons why the stay should be granted in sufficient detail to permit the Reviewing Officer to evaluate and rule upon the stay request, including at a minimum:

(A) The specific adverse effect(s) upon the requester;

(B) Harmful site-specific impacts or effects on resources in the area affected by the activity(ies) to be stopped, and

(C) How the cited effects and impacts would prevent a meaningful decision on the merits.

(d) A Deciding Officer and other parties to an appeal may provide the Reviewing Officer with a written response to a stay request. A copy of any response must be sent to all parties to the appeal.

(e) *Timeframe.* The Reviewing Officer must rule on a stay request no later than 10 calendar days from receipt.

(f) *Criteria to consider.* In deciding a stay request, a Reviewing Officer shall consider:

(1) Information provided by the requester pursuant to paragraph (c) of this section including the validity of any claim of adverse effect on the requester;

(2) The effect that granting a stay would have on preserving a meaningful appeal on the merits;

(3) Any information provided by the Deciding Officer or other party to the appeal in response to the stay request; and

(4) Any other factors the Reviewing Officer considers relevant to the decision.

(g) *Notice of decision on a stay request.* A Reviewing Officer must issue a written decision on a stay request.

(1) If a stay is granted, the stay shall specify the specific activities to be stopped, duration of the stay, and reasons for granting the stay.

(2) If a stay is denied in whole or in part, the decision shall specify the reasons for the denial.

(3) A copy of a decision on a stay request shall be sent to all parties to the appeal.

(h) *Duration.* A stay shall remain in effect for the 15-day period for determining discretionary review (§ 251.100), unless changed by the Reviewing Officer in accordance with paragraph (i) of this section.

(i) *Change in a stay.* A Reviewing Officer may change a stay decision in accordance with any terms established in the stay decision itself or at any time during pendency of an appeal that circumstances support a change of stay. In making any changes to a stay decision, the Reviewing Officer must issue a written notice to all parties to the appeal explaining the reason for

making the changes and setting forth any terms or conditions that apply to the change.

(j) *Petitions to change a stay.* An appellant or intervenor may petition a Reviewing Officer to change or lift a stay at any time during the pendency of a stay. Such petitions must be in writing, must explain how circumstances have changed since the stay was imposed, and must state why the change in the stay is being requested. The petitioner must send a copy of the petition to all parties to the appeal.

(k) *Appeal of stay decision or changes in stay.* A Reviewing Officer's decision to grant, deny, lift, or otherwise change a stay is not subject to further appeal and review, except when the first-level Reviewing Officer was the Forest Supervisor. In this instance, the Regional Forester has discretion to review.

§ 251.92 Dismissal.

(a) The Reviewing Officer shall dismiss an appeal and close the record without a decision on the merits when:

(1) The appellant is not eligible to appeal a decision under this subpart.

(2) Appellant's notice of appeal is not filed within the required time period, or the notice of appeal fails to meet the minimum requirements of § 251.90 of this subpart to such an extent that the Reviewing Officer lacks adequate information on which to base a decision.

(3) In cases where there is only one appellant, the appellant withdraws the appeal.

(4) The requested relief cannot be granted under existing law, fact, or regulation.

(5) The decision is excluded from appeal under this subpart (§ 251.83).

(6) The Deciding Officer has withdrawn the decision under appeal.

(7) A request for review of the same decision has been filed by the same person under Part 217 of this Chapter.

(b) The Reviewing Officer shall give written notice of dismissal that includes an explanation of why the appeal is dismissed.

(c) A Reviewing Officer's dismissal is subject to discretionary review at the next highest administrative level as provided for in § 251.87(d).

§ 251.93 Resolution of issues.

(a) Authorized Forest Service officers shall, to the extent practicable and consistent with the public interest, consult and meet in person, or by phone, with holders of written instruments prior to issuing written decisions related to administration of a written authorization. The purpose of such meetings is to discuss any issues or concerns related to the authorized use and to reach a common understanding and agreement where possible prior to issuance of a written decision.

(b) When decisions are appealed, the Deciding Officer may discuss the appeal with the appellant(s) and intervenor(s) together or separately to narrow issues, agree on facts, and explore opportunities to resolve the issues by means other than review and decision on the appeal. At the request of the Deciding Officer, the Reviewing Officer may extend the time periods for review and specify a reasonable duration to allow for conduct of meaningful negotiations.

(c) The Deciding Officer has the authority to withdraw a decision, in whole or in part, during the appeal. Where a Deciding Officer decides to withdraw a decision, all parties to the appeal and the Reviewing Officer must receive written notice.

§ 251.94 Responsive statement.

(a) *Content.* A responsive statement contains the Deciding Officer's response to the specific facts or issues of law or regulation and the requested relief set forth by the appellant in the notice of appeal.

(b) *Timeframe.* Unless the Reviewing Officer has granted an extension or dismissed the appeal, the Deciding Officer shall prepare a responsive statement and send it to the Reviewing Officer and all parties to the appeal within 30 days of receipt of the notice of appeal.

(c) *Replies.* Within 20 days of the postmarked date of the responsive statement, the appellant(s) and any intervenor(s) may file a written reply to the responsive statement with the Reviewing Officer. Appellants and intervenors must send a copy of any reply to a responsive statement to all parties to the appeal, including the Deciding Officer.

§ 251.95 Authority of reviewing officer.

(a) *Discretion to establish procedures.* A Reviewing Officer may issue such procedural orders as deemed appropriate to ensure orderly, expeditious, and fair conduct of an appeal providing they are consistent with other provisions of this part.

(1) In appeals involving intervenors, the Reviewing Officer may prescribe special procedures to conduct the appeal.

(2) All parties to an appeal shall receive notice of any orders or decisions on the conduct of the appeal.

(3) Orders and determinations governing the conduct of an appeal are not subject to appeal and further review.

(b) *Consolidation of appeals.* A Reviewing Officer may consolidate multiple appeals of the same decision, or of similar decisions involving common issues of fact or law and issue one appeal decision. Similarly, a Reviewing Officer may issue one decision in cases involving separate reviews filed pursuant to 36 CFR Part 217 and under this part when the decision at issue is the same decision. In such case, the Reviewing Officer shall give notice to all parties to multiple appeals.

(1) A decision to consolidate appeals is not subject to appeal and further review.

(2) At the discretion of the Reviewing Officer, the Deciding Officer may prepare one responsive statement to multiple appeals.

(c) *Requests for additional information.* Except in discretionary reviews conducted pursuant to § 251.100 of this subpart, the Reviewing Officer may ask any party to an appeal for additional information as deemed necessary to decide the appeal. Such requests will be limited to obtaining and evaluating information needed to clarify issues raised. The Reviewing Officer shall notify all parties of the request for information, provide it to all parties, give opportunity to comment, and extend time periods if necessary to allow for submission of the information.

(d) *Conduct of appeals of decisions made by the Chief.* When the Secretary elects to review an initial decision made by the Chief (§ 251.87(a)), the Secretary shall conduct the review in accordance with all the applicable rules and procedures of this subpart.

§ 251.96 Intervention.

(a) A request to intervene in an appeal may be made at any time prior to the closing of the appeal record (§ 251.98) at the first level of appeal (§ 251.87). Requests to intervene in an appeal at the discretionary review level (§ 251.87(d)) shall be denied.

(b) To request intervention in a first-level appeal under this subpart, a party, at a minimum, must:

(1) Submit a written petition to intervene to the Reviewing Officer,

(2) Be, as defined at § 251.81 of this subpart, an applicant for or party to a written instrument issued by the Forest Service that is the subject of or affected by the appeal, and have an interest that could be directly affected by a decision on the appeal, and

(3) Show, in the request for intervention, how the decision on the appeal would directly affect petitioner's interests.

(c) The Reviewing Officer determines whether a party requesting intervention meets the requirements of paragraph (a) of this section. In granting intervention, the Reviewing Officer must give notice to all other parties to the appeal.

(d) A granting or denial of intervention is not subject to appeal to a higher level.

(e) Appellants and intervenors must concurrently furnish copies of all submissions to each other as well as the Deciding Officer. Failure to provide each other copies may result in removal of a submission from the appeal record. At the discretion of the Reviewing Officer, appellants may be given additional time to review and comment on initial submissions by intervenors.

(f) An intervenor cannot continue an appeal if the appellant withdraws the appeal.

§ 251.97 Oral presentation.

(a) *Purpose.* An oral presentation provides an additional opportunity for an appellant, and other parties to an appeal, to present their viewpoints to the Reviewing Officer. The purpose is to restate, emphasize, and/or clarify information related to an appeal. Oral presentations are to be conducted in an informal manner and shall not be subject to formal rules of procedure such as those applicable to judicial proceedings.

(b) *Requests.* Only an appellant may request and be granted an oral presentation. An appellant may request an oral presentation at any time prior to closing of the appeal record (§ 251.98). A Reviewing Officer shall automatically grant an oral presentation if the appellant requested the presentation as part of the notice of appeal.

(c) *Participation.* At the discretion of the Reviewing Officer, oral presentations may be open to public attendance, but participation is limited to parties to the appeal. The Reviewing Officer shall advise all parties to the appeal, including the Deciding Officer, of the place, time, and date of the oral presentation, and how the oral presentation will be conducted. All parties to an appeal shall be invited to participate. Appellants and intervenors must bear any expense involved in making an oral presentation in person or by telephone.

(d) *Limitation.* Oral presentations shall be held only at the first level of appeal (§ 251.87(b)).

§ 251.98 Appeal record.

(a) The following rules apply only to the appeal record for appeals at the first level (§ 251.87 (a), (b)):

(1) It is the responsibility of the Reviewing Officer to maintain in one location the documents related to the appeal.

(2) The record consists of the documents filed with the Reviewing Officer including, but not limited to, the notice of appeal, responsive statement, replies to submissions by various parties to the appeal, orders and determinations made on the conduct of the appeal, and correspondence.

(3) The Reviewing Officer has discretion to remove from the record documents that were not sent to all parties to an appeal.

(4) Unless the Reviewing Officer has ordered otherwise, the appeal record closes with the expiration of the time period for filing of the reply(ies) to the responsive statement, or at the conclusion of an oral presentation, if there is one. The Reviewing Officer shall notify all parties to an appeal of the closure of the record.

(5) The appeal record is open to public inspection.

§ 251.99 Appeal decision.

(a) The Reviewing Officer shall base the appeal decision on the appeal record and laws, regulations, orders, policies and procedures in effect at the time the decision was made.

(b) The Reviewing Officer shall affirm or reverse the original decision whole or in part and include the reason(s) for the decision. The Reviewing Officer may also include in the appeal decision instructions for further action by the Deciding Officer.

(c) At the first level of appeal, the Reviewing Officer shall make and issue an appeal decision within 30 days of the date the record is closed.

(d) At the second level of appeal provided in § 251.87(c), the Reviewing Officer shall make and issue an appeal decision within 30 days of the date the record is received from the first level Reviewing Officer.

(e) The Reviewing Officer shall send a copy of all appeal decisions to all participants.

(f) Unless the next higher officer exercises the discretion to review an appeal decision as provided in §§ 251.87(e) and 251.100 of this subpart, the appeal decision is the final administrative decision of the Department of Agriculture and is not subject to further review under this subpart or Part 217 of this chapter.

§ 251.100 Discretionary review.

(a) Petitions or requests for discretionary review shall not, in and of themselves, give rise to a decision to exercise discretionary review. In electing to exercise discretion, a Reviewing Officer should consider, but is not limited to, such factors as controversy surrounding the decision, the potential for litigation, and whether the appeal decision is precedential in nature or establishes new policy.

(b) Within one day following the date of a dismissal (§ 251.92) or an appeal decision (§ 251.99) is signed by a Reviewing Officer, the Reviewing Officer shall forward a copy of the appeal decision and the initial decision upon which the appeal is predicated to the next higher officer.

(c) The next higher level officer shall have 15 calendar days from date of receipt to decide whether or not to review an appeal decision and may call for or use the appeal record in deciding whether or not to review the appeal decision. If the record is requested, the 15-day period is suspended at that point. The lower level Reviewing Officer shall forward it within 5 days of the request. Upon receipt, the higher level officer shall have 15 days to decide whether or not to review the lower level decision. If that officer takes no action by the expiration of the discretionary review period, appellants shall be notified that the appeal decision of the Reviewing Officer stands as the final administrative review decision of the Department of Agriculture.

(d) When an official exercises the discretion in § 251.87(d) or § 251.87(e) of this subpart to review a dismissal or appeal decision, the discretionary review shall be made on the existing appeal record and the lower level Reviewing Officer's appeal decision. The record shall not be reopened to accept additional submissions from any party to the appeal or from the Reviewing Officer whose appeal decision is being reviewed.

(e) When an official exercises discretion to review an appeal decision, a Reviewing Officer may extend a stay, in whole or in part, during pendency of the discretionary review.

(f) The second level Reviewing Officer shall conclude the review within 30 days of the date of notice issued to an appellant that the lower level decision will be reviewed.

(g) If a discretionary review decision is not issued by the end of the 30-day review period, appellants and intervenors shall be deemed to have exhausted their administrative remedies for purposes of judicial review. In such case, appellants, intervenors, and the lower level Reviewing Officer shall be notified.

(h) The Reviewing Officer shall provide a copy of the decision to all

appellants, intervenors, the Deciding Officer, and the lower level Reviewing Officer.

§ 251.101 Policy in event of judicial proceedings.

It is the position of the Department of Agriculture that any filing for Federal judicial review of and relief from a decision appealable under this subpart is premature and inappropriate, unless the appellant has first sought to resolve the dispute by invoking and exhausting the procedures of this subpart. This position may be waived only upon a written finding by the Chief.

§ 251.102 Applicability and effective date.

(a) Except where applicants or holders elect the decision review procedures of Part 217 of this Chapter, all appeals of decisions by applicants or holders arising from the issuance, approval, and administration of written instruments authorizing occupancy and use of National Forest System lands as defined at § 251.82 of this subpart shall be subject to the provisions of this subpart as of February 22, 1989.

(b) Appeals of the type covered by this subpart and filed prior to February 22, 1989, shall continue to be conducted under the provisions of 36 CFR 211.18.

PART 292—NATIONAL RECREATION AREAS [AMENDED]

Subpart C—Sawtooth National Recreation Area—Private Lands [Amended]

8. The authority citation for Part 292, Subpart C continues to read as follows:

Authority: Sec. 4(a), Act of Aug. 22, 1972 (86 Stat. 613).

§ 292.15 [Amended]

9. Revise § 292.15(*l*) to read as follows:

* * * * *

(*l*) *Appeals.* Any landowner who is adversely affected by a decision of the Area Ranger under these regulations may file an appeal under the provisions of 36 CFR Part 251, Subpart C.

Date: January 12, 1989.

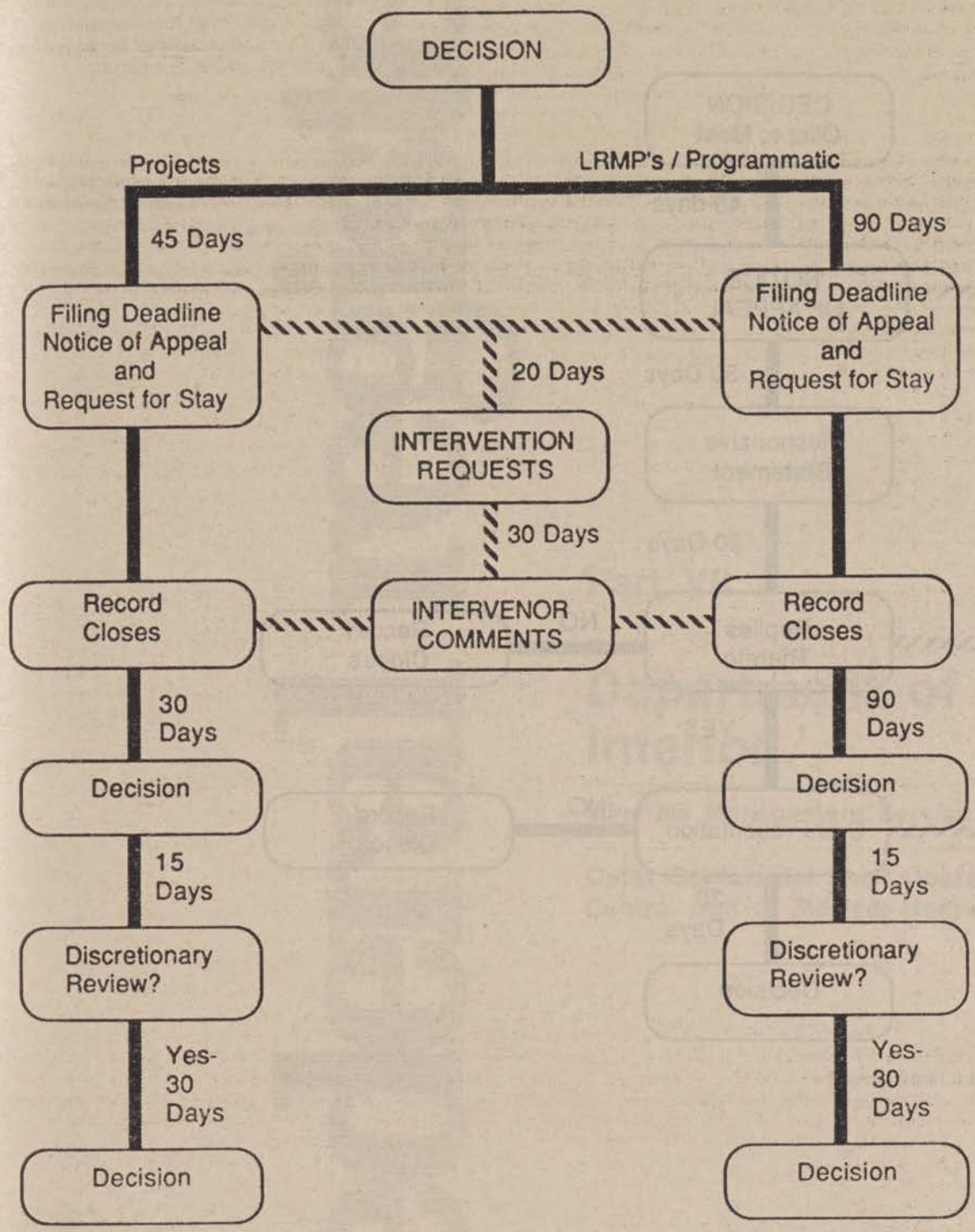
Richard E. Lyng,

Secretary.

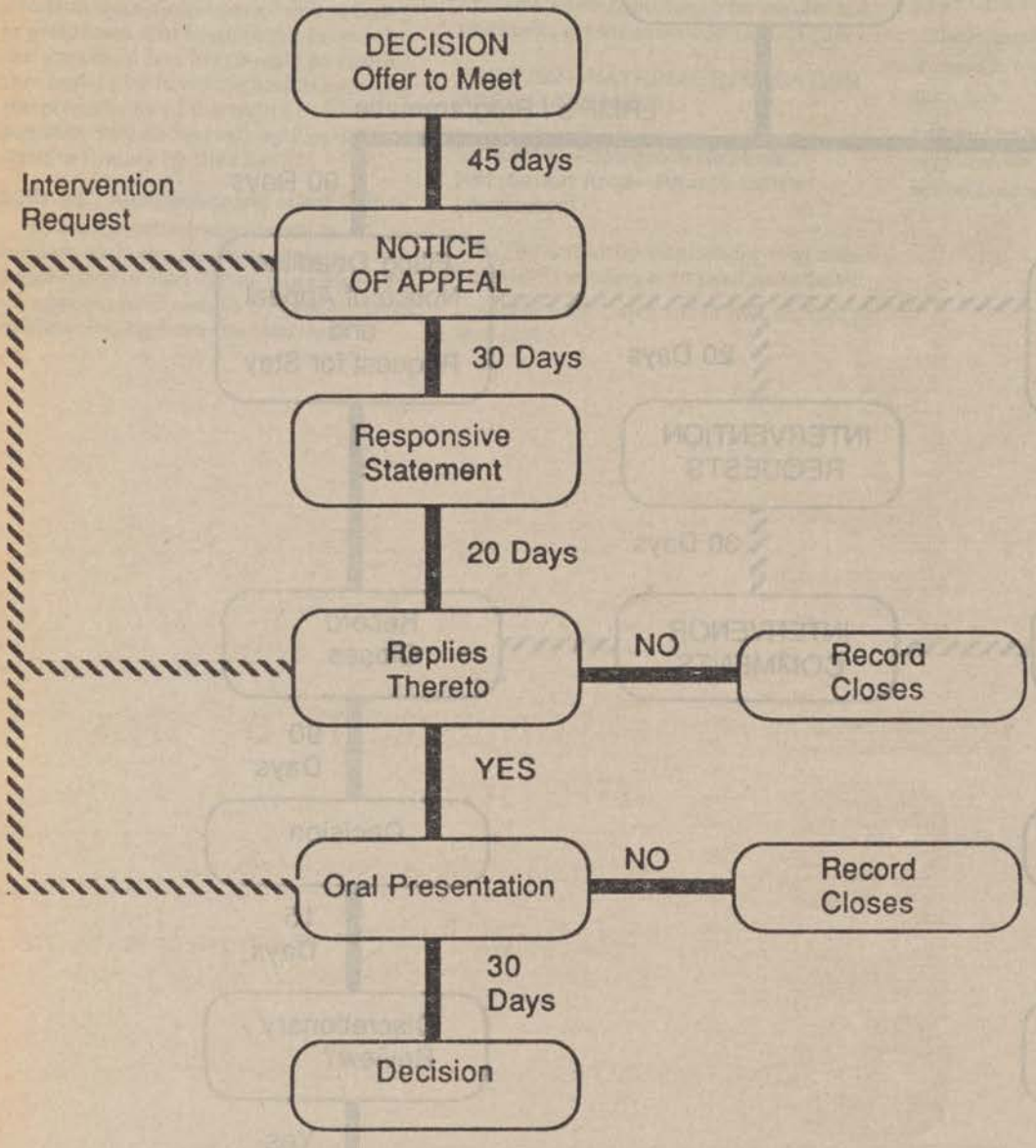
Editorial note: These appendices will not appear in the Code of Federal Regulations.

BILLING CODE 3410-11-M

Appendix A - 36 CFR 217



Appendix B - 36 CFR 251



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